

United States

5  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

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R. W. BROOKS, CARL M. DONALDSON, BYRON ECHOLS,  
B. J. GALE, G. LYNN HATCH, RACHEL JENSEN,  
MILTON N. JENSEN, R. T. JOHNS, WILLARD E.  
JONES, JOHN B. JONES, PARLEY P. JONES, T. V.  
JONES, P. L. LUNT, FENLEY F. MERRILL, ORSON  
A. MERRILL, HANS MORTENSEN, LESLIE B.  
PAYNE, ORSON J. RICHENS, HENRY L. SMITH,  
FLORENCE R. SWOFFORD, MARY JANE JONES,  
ANNA H. LUNT, NANCY O. PACE, JUNIUS E.  
PAYNE, J. E. PAYNE, Trustee of the Church of Jesus  
Christ of Latter Day Saints, E. C. PAYNE, RALPH  
RICHARDSON, R. RICHENS, NANCY A. SMITH, E.  
THYGERSON, and B. Y. WHIPPLE,

Appellants,

vs.

UNITED STATES OF AMERICA, and C. A. FIRTH,  
Appellees.

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**Transcript of Record**  
**In Five Volumes**

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**VOLUME I**

*Vols 2, 3, 4, 5 misc*

Upon Appeal from the District Court of the United  
States for the District of Arizona.







NO. 9544

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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VOLUME I

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Upon Appeal from the District Court of the United  
States for the District of Arizona.



## INDEX

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## ATTORNEYS OF RECORD

M. C. MECHEM, Esquire,  
First National Bank Building,  
Albuquerque, New Mexico

A. T. HANNETT, Esquire,  
First National Bank Building,  
Albuquerque, New Mexico

H. VEARLE PAYNE, Esquire,  
Lordsburg, New Mexico

L. P. McHALFFEY, Esquire,  
Lordsburg, New Mexico  
Attorneys for Appellants.

FRANK E. FLYNN, Esquire,  
United States Attorney,  
Phoenix, Arizona

H. S. McCLUSKEY, Esquire,  
Special Attorney,  
Ellis Building,  
Phoenix, Arizona  
Attorneys for Appellee

JOHN C. GUNG'L, Esquire,  
Valley National Building,  
Tucson, Arizona  
Attorney for Water Commissioner [506\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court  
for the District of Arizona

E-59

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GILA VALLEY IRRIGATION DISTRICT, et al.,  
Defendants.

## DOCKET ENTRIES

Date				Filings—Proceedings.
Month	Day	Year		
1	Oct	3	1925	File Complaint
*	*	*	*	*
66	Dec	5	1927	File Amended Complaint.
*	*	*	*	*
103	Oct	8	1928	File Admission of Service of Amended Complaint, & Stip. extending time to Answer to & including 11/5/28 of Deft Franklin Irrigation District & 301 other Defts
*	*	*	*	*
113	Jan	8	1929	File Answer of Greenlee County, Ariz, and Hidalgo Co. New Mex, defts to amended complaint
*	*	*	*	*
417	Apr	10	1940	File Supersedeas Bond on Appeal pur- suant to Order of 4/10/40 (contempt) (National Surety Corporation of New York)
*	*	*	*	*

[Title of District Court and Cause.]

**AMENDED COMPLAINT**

1. The United States of America, having first obtained leave of the Court, brings this, its Amended Bill of Complaint against the following named defendants:

Gila Valley Irrigation District, et al :

Virden Irrigation District

Casper-Windham Canal Company :

J. R. Beavers, H. G. Davidson (being the same person named in the original complaint as E. G. Davidson), Estate of Jasper Gale, A. T. Layton, R. H. Lunt, Arven Mortensen (being the same person named in the original complaint as Arvin Mortensen), Peter Mortensen, W. Plune Tibbets (being the same person named in the original complaint as P. Tibbets), Peter Wahlin (being the same person named in the original complaint as Peter Whelin), Mrs. T. M. Williamson (being the same person named in the original complaint as T. M. Williamson) ;

Greenhorn Ditch Company; Shriver Ditch Company : W. W. Lloyd, Frank Shriver (being the same person named in the original complaint as John Shivers), W. F. Shriver;

Sunset Canal Company :

Florentino Billaba, C. M. Brooks, R. W. Brooks, S. A. Brown, J. E. Cardon, Byron Echols, M. B. Echols, W. P. Foster, Trivio Gonzales, H. Grady, M. L. Harris (being the same person named in the

original complaint as M. F. Harris), C. F. Houlihan (being [508] the same person named in the original complaint as C. F. Houhilan, M. J. Jensen, J. B. Johns, R. T. Johns, Delbert Johnson (being the same person named in the original complaint as D. Johnson), D. L. Johnson, F. W. Jones, John B. Jones, Mary Jane Jones, Parley P. Jones (being the same person named in the original complaint as Perley P. Jones), T. V. Jones, Willard E. Jones (being the same person named in the original complaint as Willard L. Jones), Anna H. Lunt, G. V. Lunt, P. L. Lunt, M. J. McLaren, Orson A. Merrill (being the same person named in the original complaint as Orson Merrill), Fenley F. Merrill, Hans Mortensen, Hiram K. Mortensen, Joseph A. Mortensen, Mrs. J. O. Pace, E. C. Payne, G. O. Payne, Junius E. Payne, Leslie B. Payne (being the same person named in the original complaint as L. Payne), H. M. Payne (being the same person named in the original complaint as H. N. Payne), R. Richardson, Henry L. Smith, B. Y. Whipple (being the same person named in the original complaint as D. Y. Whipple).

(The complaint in paragraph I, in addition to the foregoing, named as defendants some 40 canal or ditch companies and irrigation districts and approximately 1500 defendants, comprising municipal corporations, school districts, corporations and persons, residents of Arizona and New Mexico, who are not Indians or wards of the United States or represented by the United States.)

Answer under oath is hereby expressly waived.

For its cause of action the plaintiff alleges:

2. That the jurisdiction of this court in this suit depends upon the fact that the United States of America is a party thereto.

3. That this suit is brought by the United States for itself and as Trustee and Guardian for the Pima and Apache Indians, occupants and possessors of large areas of land with water rights appertaining thereto in the Gila River Indian Reservation and the San Carlos Indian Reservation, respectively, [509] in the State of Arizona; and is instituted at the suggestion of the Secretary of the Interior and by direction and authority of the Attorney General.

4. (a) That the defendant, Gila Valley Irrigation District, is an irrigation district organized and existing under the laws of the State of Arizona, havings its principal place of business in Graham County in the District of Arizona; that the defendant, Florence-Casa Grande Water Users' Association, is an association authorized under the laws of the State of Arizona to do business in the District of Arizona, havings its principal place of business in the District of Arizona; that the defendant, Franklin Irrigation District, is an irrigation district organized and existing under the laws of the State of Arizona, having its principal place of business in Greenlee County in the District of Arizona; that the defendant, Virden Irrigation District, is an irrigation district now in process of

organization under and pursuant to Chapter 41, and Session Laws of the State of New Mexico, 1919, and is being organized and incorporated as a body corporate and politic of said State of New Mexico.

\* \* \* \* \*

(c) That certain others of said defendants, to-wit: \* \* \* Sunset Canal Company, Sunset Irrigation Canal Company \* \* \* are corporations doing business in Greenlee County in said District of Arizona.

\* \* \* \* \*

(f) That certain others of said defendants, to-wit: Cosper-Windham Canal Company, Franklin Canal Company, Greenhorn Ditch Company, Nichols and Company, Sunset Canal Company, and Valley Canal Company are corporations doing business in the District of New Mexico, County of Hidalgo. \* \* \*

5. That the Pima Indians, from time immemorial until the first reservation was made for them by the United States, as hereinafter described, occupied and possessed a large area of land on [510] the Gila River in the State and District of Arizona, which area included the lands now embraced in the Gila River Indian Reservation. When the first White Men visited that region, they found these Indians irrigating from the Gila River extensive areas of said land, and raising large crops thereon. These Indians then numbered about as many persons as they do to-day, which is approximately 5,000. They claimed a larger area along the Gila

River than that now embraced in their reservation, but later agreed with the United States to accept their present boundaries. The land they occupied, including those comprising their present reservation, are arid and to produce crops require irrigation. The Indians at all times have held and now hold, under the Indian title of occupancy and possession, the lands now comprising the said reservation.

6. The Gila River is an innavigable stream which flows through the said reservation from east to west. With the lands of said reservation, the Pima Indians also did and do occupy and possess to a large extent the usufruct of the waters of the Gila River, and with said waters at all times have irrigated large areas of said lands. The waters thus possessed by said Indians are a quantity sufficient to irrigate the lands subsequently allotted to them as irrigable allotments, said allotments being made to individuals among said Indians and amount to 49,896 acres; and also enough water to irrigate such parts of said reservation as have come to be used for a school farm, agricultural experiment station, and for other administrative purposes. The areas of this latter character comprise approximately 650 acres. The waters so occupied amount to 632 second-feet running continuously throughout the year, but with a limitation for each year of 252,730 acre-feet of water. Such waters, to the extent that they have been used thus far for irrigation, have been diverted through numerous canals having their headings within said reservation, and

they are now to be diverted through the same canals, and also by [511] means of the Ashurst-Hayden dam, situate about ten miles above the town of Florence, Arizona, and the Sacaton dam, situate on said reservation. The priority of the rights of said Indians and of the United States to said waters is of immemorial date.

7. The United States, on its acquisition from Mexico (by the Treaty of Guadlupe-Hidalgo and the Gadsden Purchase) of the territory within which are the lands occupied by the Pima Indians (and also those occupied by the Apache Indians, rights concerning which are hereinafter described), became and ever since has remained the guardian of the Indian inhabitants, including the said Pimas and Apaches, and became the owner of the soil of said territory (with the exception of that contained in certain Spanish and Mexican grants theretofore made, but not relevant here). The title of the United States to the lands thus acquired from Mexico also as just stated was encumbered by the aforesaid title of occupancy and possession of the Pima Indians and by a like title of the Apache Indians. The United States, upon such acquisition, furthermore became the full sovereign of said territory, having both national and municipal or state sovereignty; and it had plenary power over said lands and waters.

(a) Thereafter, the United States, by a series of Acts of Congress, proclamations and executive orders, including the following: Act of February

28, 1859 (11 Stat. 501); Executive Orders of date August 31, 1876, January 10, 1879, June 14, 1879; May 5, 1882; November 15, 1883; May 2, 1911; July 31, 1911; December 16, 1911; June 2, 1913; August 27, 1914; March 18, 1915; and July 19, 1915, recognized that the lands and waters above described belonged to the Pima Indians under their title of occupancy and possession, and confirmed and made more secure those rights as far as they covered or related to said reservation, and reserved for said Indians the lands and water rights comprised in or connected with the Gila River Indian [512] Reservation. The lands in said reservation are situate in the Counties of Pinal and Maricopa, and comprise about 375,422 acres. The reservations thus made have been approved, ratified, confirmed, and recognized, and the purposes connected with them have been carried out by numerous Acts of Congress and proclamations and executive orders. Furthermore, the United States, ever since said Gila River Indian Reservation was established, has maintained thereon extensive schools, administrative offices and other facilities for carrying out the Federal Indian policy and for educating the Indians of said reservation and helping them to acquire the habits of civilized life.

(b) The water rights reserved in connection with the reservation of said land for the Pima Indians are alleged to be the following to-wit: So much of the waters of the Gila River as should be needed to carry out the purposes of the United

States in recognizing and in making said reservation of lands, and also in accomplishing the civilization and bringing about the prosperity of said Indians. The said rights amount to the same quantities of water as stated in the foregoing article 6, to-wit: 632 second-feet of the waters of said Gila River running continuously throughout the year but with a limitation for each year of 252,730 acre-feet of water. Said rights have an immemorial priority as set forth in Paragraph 6 as well as of the date of said first reservation, which was February 28, 1859.

8. The Pima Indians, from the time of the first knowledge of white men concerning them, and previous thereto, and before any appropriations or uses of waters of the Gila River by White Men, and until and including the present time, have irrigated with the waters of that river large areas of the lands now included in their said reservation and allotments, and cultivated crops upon them, through various canals and ditches, many of [513] which ditches are, and even in ancient times were, of large size. The lands so irrigated, as shown by surveys made in recent years of present and past cultivated areas, amount to not less than 28,000 acres.

(a) The United States, therefore, is entitled to and claims on account of said Indians, as mere appropriators with an immemorial priority, the use of 350 second-feet of water, continuous flow, from

said river, with a yearly limitation of one hundred forty thousand (140,000) acre-feet.

9. The Apache Indians, at a long time antedating the acquisition by the United States of the lands ceded as aforesaid by Mexico, occupied and possessed and owned, under the Indian title of occupancy and possession, subject only to whatever rights of a like nature their neighbors and enemies, the Pima Indians, had, a large area which included that now reserved to them by the establishment of their reservation known as the San Carlos Indian Reservation. This reservation is comprised of one million, eight hundred thirty-four thousand, two hundred forty (1,834,240) acres, and is situate in Gila and Graham Counties, in the state and District of Arizona.

(a) The said Apache Indians were hunting and war-making Indians, and were confined in the above-described area, which was smaller than that over which they formerly roamed and which they formerly claimed; said confinement was the result of wars and agreements, and the said reservation was made pursuant to the policy of the United States with regard to said Apache and other Indians, of inducing them or compelling them to confine themselves to definite areas and of teaching them through agriculture and otherwise, to adopt the ways of civilized life. The aforesaid reservation for said Apache Indians was made as an addition to the White Mountain Reservation theretofore

established, and the proclamations and executive orders creating it include the following dates:

December 14, 1872; August 5, 1873; July 21, 1872; October 30, 1876; January 26, 1877; March 31, 1877; December 22, 1902; February 17, 1912. [514]

(b) The Apache Indians above-mentioned, with other Indians admitted to share their rights with them, number some twenty-six hundred (2600) persons, some five hundred (500) of whom live upon the Gila River proper, while the rest live upon the San Carlos River. These Indians are entitled by their rights of occupancy and possession and on account of the reservations thus made, to sufficient water for the irrigation of the lands deemed necessary for them to irrigate from the Gila River, excluding the San Carlos River, three thousand (3000) acres of land, which lands are of a good agricultural character and are susceptible of irrigation from said stream and require irrigation to make them capable of producing crops. The amount of water to which the United States and the said Indians are entitled, on said account, is  $37\frac{1}{2}$  second-feet of continuous flow, with a limitation of fifteen thousand (15,000) acre-feet per year. The said water rights has a priority, antedating all priorities of white persons and as of the date when the Apache Indians first came to occupy said territory, which was before the United States or Mexico acquired sovereignty thereof, as well as a priority as of the

date of said first reservation, which was December 14, 1872. Said reservation was made at a time when the United States had both national and municipal sovereignty and plenary power with regard to the disposition of said lands and waters.

10. The Indians of said San Carlos Reservation irrigated with the waters of the Gila River, exclusive of the waters of the San Carlos River, through a number of ditches on their reservation aforesaid, from the year 1873 to the year 1900, and since, beginning with 100 acres and increasing to 2,500 acres of land in the year 1900, and on account thereof the United States is entitled, as a mere appropriator, to 32 second-feet of water, continuous flow, with a limitation of 12,800 acre-feet of water per annum, with priorities as of the dates of original and increased irrigation, and all prior to the year 1901. [515]

11. From the time of the first establishment of the Gila River Indian Reservation as aforesaid, until the passage of the Act of Congress of May 18, 1916, described in the next Article hereof, the United States, in carrying out its policy with regard to the Indians of said reservation, did many things on and connected with said reservation to aid said Indians in irrigating their lands, and was supported therein by the individual and group efforts of the Indians themselves. Among said things have been the improvements of old Indian canals and the construction of new ones, including the building of the new San Tan Canal on the north side of the said

river, through the Reclamation Service, in 1906, at an approximate cost of Five Hundred Thousand (\$500,000.00) Dollars; the construction of the Sacaton Dam, which is just now being completed at a cost of approximately Seven Hundred Thousand (\$700,000.00) Dollars; the improvement of the Little Gila Canal with laterals therefrom, a work accomplished under a number of subordinate projects, among which are the Little Gila and Island Projects, under which was expended approximately Seventeen Thousand (\$17,000.00) Dollars, and the Casa Blanca Canal Project, under which was expended about Twenty-five Thousand (\$25,000) Dollars. The United States duly posed and recorded Notices of Appropriation in respect to each of said enterprises in conformity with State law. The work under said Projects has been and is being diligently prosecuted; the acts done under them have been for the purpose of irrigating all of the aforesaid allotments of the Indians of said reservation, or allotments which may be substituted therefor, except possibly a comparatively small number of such allotments comprising not more than 1,300 acres which can be irrigated best with water from the Salt River. Said acts were also for the purpose of irrigating the lands on said reservation utilized by the Government for administrative and agricultural experiment station purposes. Said areas aggregate approximately 650 acres. [516]

(a) The aforesaid activities of the United States were undertaken and carried out in furtherance of

the Indian occupancy and reservation rights hereinbefore set forth, and have been prosecuted with diligence. Said activities entitle the plaintiff to water rights and priorities as aforesaid of immemorial date as well as of the date of said first reservation, and as mere appropriations as of the dates of the posting of said Notices and the doing of said acts.

12. Under the Act of Congress of May 18, 1916, heretofore referred to, the United States, through the Secretary of the Interior, promptly settled water rights between all but a few of the White land-owners and water users of the Florence-Casa Grande Valley and the United States on account of the Pima Indians, and undertook and established the Florence-Casa Grande Project.

(a) The United States, in furtherance of said Project, supplementary to other rights therefor hereinabove set out, on May 22, 1916, duly gave notice of appropriation and reservation of waters of the Gila River for said Project by posting a notice at the site of the dam named below, and recording the same, and otherwise. The amount of water claimed under said notice was 2,000 second-feet.

(b) That Project contemplates the irrigation of at least 62,000 acres of land, with the idea that approximately 35,000 acres shall be Indian lands embraced in the allotments aforesaid and including the said administrative lands, and 27,000 acres of White lands in the Florence-Casa Grande Valley.

The work in connection with said Project was promptly begun and has been diligently prosecuted from the time of its inception under said Act in 1916 and from the time of said notice, and is now being so prosecuted. The Ashurst Hayden diversion dam, which is one of the structures of said Project, was finished in the year 1922, and cost approximately Two Hundred Fifty Thousand (\$250,000.00) Dollars. From that dam run the canals of the Project which take the water to the Indian and White distributing systems thereof. Sand canals have largely been completed, and to date have cost approximately Seven Hundred Fifty Thousand (\$750,000.00) Dollars, [517] and, together with said dam, are adequate to divert and in fact have a capacity of more than 1,000 second feet.

(c) Certain White persons, owners of the 27,000 acres of lands aforesaid which were taken into the Casa Grande Project, by themselves and their predecessors in interest, by the posting of notices under the Territorial and State laws, by diligent construction of works, diversion and carriage of the waters of the Gila River to their lands and application thereof to beneficial use thereon, had acquired vested rights by appropriation to said waters as of various dates (as stated in the Lockwood Decree and Order of the Secretary of the Interior hereinafter referred to), which, in the aggregate, with certain 1915 priorities given under said Project, amounted to 337.5 second-feet with a limitation of 135,000 acre-feet per annum, and granted and con-

vveyed the same to the United States for use in connection with said Project at or about the time of the above-mentioned settlement of rights therefor. Descriptions of the several tracts of land supplied by the aforesaid rights, and descriptions of said rights and their respective extents and the priorities thereof are contained in the Order of the Secretary of the Interior made April 22, 1920, designating the White lands to be included in the Florence-Casa Grande Project, and in the original and supplemental decree of the Superior Court of Pinal County, Arizona, made in the case of Lobb v. Avenente, et al., and commonly called "the Lockwood Decree."

The Acres and Priorities fixed in said Order as follows:

\* \* \* \* \*

Total 27,000 acres.

Descriptions of the several tracts of land covered by the aforesaid rights are set forth in the Order of the Secretary of the Interior made April 22, 1920, designating the White lands to be included in the Florence-Casa Grande Project. [518]

(d) Also, at that time, there were conveyed to the United States, in connection with and for use upon said Project, many inchoate water rights owned by said White persons and others connected with them and acquired in the manner aforesaid. Said rights include those initiated and claimed by the Casa Grande Valley Water Users' Association, which Association partly constructed a large canal which was later purchased and taken over by the

United States, at a cost of Fifty Thousand (\$50,000.00) Dollars, and is now in process of completion by the United States as one of the main canals of said Project. Said Association spent in the construction of said canal upwards of Eighty Thousand (\$80,000.00) Dollars.

The United States claims, on account of said reservation and as a mere appropriator, for said Project, 775 second-feet of water, continuous flow, with a limitation of 310,000 acre-feet per year, with a priority as of the date of the passage of said act, which was May 18, 1916, as well as of the date of the posting of said notice, which was May 28, 1916; and claims on account of said conveyed vested rights of White persons 337.5 second-feet of water, continuous flow, with a right of storage in the Picacho Reservoir, and with a limitation of 135,000 acre-feet per annum, with priorities as in said order mentioned.

13. The United States, before the year 1896, and before the passage of the Reclamation Act (Act of June 17, 1902, 32 Stat. 388), made examinations of the water resources of a considerable part of the United States, through the Geological Survey, in anticipation of the adoption by the United States of the so-called Reclamation Policy. Among the water resources examined were those of the Gila River, and the fact, which even at that time had long been known, was by such examinations confirmed, that the so-called San Carlos Reservoir

Site was the most important site for a reservoir on the Gila River, and one of [519] the most important sites for an irrigation reservoir anywhere in the southwestern part of the United States.

(a) The United States, by such investigations and the appropriations of Congress authorizing and supporting them, initiated at that time, which was prior to 1900, the so-called San Carlos Project. The site for the dam and the site for the reservoir of said Project are situated on the aforementioned San Carlos Indian Reservation, which Reservation, as before stated, was set aside for the Apache Indians on December 14, 1872. From the earliest days of the consideration of the San Carlos Project, the United States set apart, protected and reserved the said dam and reservoir sites for the purposes of said Project, and thenceforward, by numerous Acts of Congress and acts of the executive branch, refused to permit encroachments upon said sites, and preserved the same for the purposes of said Project.

(b) The United States, in further carrying out the San Carlos Project, so constructed and organized its Florence-Casa Grande Project, hereinbefore described (all of the lands of which are expected to be included in the San Carlos Project), as to make it suitable for utilization in connection with the San Carlos Project. The United States, in still further carrying out and protecting said San Carlos Project, and in order to preserve from encroachments the waters necessary therefor, and to make the waters of the Gila River, not theretofore

appropriated by and vested in others, available for irrigation of the lands of said Project, whether said lands should be below or above the said proposed Coolidge Reservoir, reserved, among other things, dam and reservoir sites upon the Gila River, by executive orders as follows: January 18, 1906; December 18, 1909; March 1, 1912; March 18, 1915; February 1, 1917; March 21, 1917; March 15, 1920; May 25, 1920; October 23, 1924; and November 22, 1924.

[520]

(e) By the Act of June 7, 1924, entitled "An Act for the continuance of Construction Work on the San Carlos Federal Irrigation Project in Arizona" (which is the San Carlos Project heretofore referred to (43 Stat. 475, 476) "and for Other Purposes", the Secretary of the Interior is authorized to construct, under a limit of cost of Five Million, Five Hundred Thousand (\$5,500,000.00) Dollars, a dam at the said San Carlos reservoir site, and to create said reservoir; and pursuant to said Act, work is being diligently prosecuted to complete said project.

(d) It is contemplated that said Project will irrigate: (1) the irrigable allotments (each of which embraces ten irrigable acres) made to the Indians of the Gila River Indian Reservation and now held by them under trust patents, or any other allotments which may in individual cases be substituted therefor, together with the administrative areas above alleged; (2) the 27,000 acres of White lands now embraced in the Florence-Casa Grande Project; (3) such a quantity of White lands as,

with the foregoing Indian and White lands, will make up one hundred thousand acres, and (4) such additional lands as it shall be found feasible to irrigate as a part of said Project.

(e) The said Reservoir, by the Act of Congress of June 7, 1924, (43 Stat. at Large, 475, 476), as planned for and being built, has been named the "Coolidge Reservoir" and will have a capacity of 1,285,000 acre-feet of water; and, in order to give proper service and make economical use of the water resources of the said Gila River and of the resources of said reservoir, it will have to be filled and kept filled by the waters of said river as often as the yield of said river permits, and said waters as thus stored are and will be necessary for the proper irrigation of the lands included within said Project as above described.

(f) The United States, by undertaking said San Carlos Project, as aforesaid, and by steps made in connection therewith, has reserved and appropriated of the waters of the Gila River sufficient water to fill and keep full said reservoir, [521] as aforesaid, with a priority as of not later than the year 1896. The United States has also, by said acts, reserved and appropriated whatever water, if any, may be necessary from the Gila River, to be diverted at the Ashurst-Hayden dam and the Sacaton Dam for the irrigation of lands lying below said points of diversion which will be included in said Project.

14. By reason of the things hereinabove set forth, the United States has reserved and appro-

priated, acquired and owns, and is entitled to use for said Indian reservations, the Florence-Casa Grande Project and the San Carlos Project, in the waters of the Gila River, the rights hereabove enumerated, the same being briefly stated as follows:

(a) 632 second-feet of water, with a limitation of 252,730 acre-feet per annum, with a priority of immemorial date, as well as of February 28, 1859, and 350 second-feet with a yearly limitation of 140,000 acre-feet with a priority of immemorial date, to be diverted on the Gila River, but not below the west line of the Gila River Indian Reservation, now reserved as claimed under Articles 5, 6, 7, 8, and 9 hereof, the first figures above-named representing the total diversion under these priorities.

(b)  $37\frac{1}{2}$  second-feet of water with a limitation of 15,000 acre-feet per annum, and 32 second-feet with a yearly limitation of 12,000 acre-feet, to be diverted by ditches serving the San Carlos Reservation lands or any lands which may be substituted therefor, or to be stored as claimed in Articles 9 and 10 hereof, with priorities, respectively, as of the year 1846, when the United States obtained sovereignty over that territory, as well as of December 14, 1872, when said San Carlos Reservation was made, and as of the [522] dates from 1873 to 1901, stated in Article 10; the

figures first above named representing the total diversion under these priorities.

(c) 775 second-feet of water, with a limitation of 310,000 acre-feet per annum, and 337.5 second-feet, with a yearly limitation of 135,000 acre-feet, to be diverted at the Ashurst-Hayden dam and the Sacaton Dam, and at intermediate places on said river, as claimed in Article 11 hereof, with priorities, respectively of May 18, 1916, as well as of May 22, 1916, and as in the Lockwood Decree and Order of the Secretary of the Interior fixed, as mentioned in Article 12 hereof; the first above-named figures representing the total diversion under the priorities.

(d) Sufficient water to fill and keep filled each year the Coolidge Reservoir aforesaid, which has a capacity of 1,285,000 acre-feet, with a priority not later than the year 1896, and water directly diverted from the natural flow of said Gila River, as claimed in Article 13 hereof.

15. Each of the defendants, except those who have by contracts devoted their water rights to the said Florence-Casa Grande Project, and the San Carlos Project, and so are interested on the side of the United States in this action, as above set forth, claims some right to divert water from the Gila River as it flows between a line 10 miles east of the parallel to the dividing line between Arizona and New Mexico, and the confluence of the Salt

River with the Gila River, and after the following tributaries of the Gila River, the San Francisco River, the San Carlos River, the San Pedro River, and the Santa Cruz River, respectively, have joined the main stream, and all but a few of said diversions being in the [523] District of Arizona; or the said defendants claim some right to store the water of said river, or of some tributary thereof, either within or above the stretch of the same as just described. The United States has no knowledge or means of knowledge of the exact nature of the claims of the defendants to rights in or or the use of said water, but such claimed rights, so far as the United States has knowledge thereof, are numerous, intricate and various, and are conflicting with and adverse to the rights of the United States as hereinabove set forth; and the rights claimed by the defendants, if exercised, would, and when exercised do, diminish the volume of water in said river so as to deprive the United States of the amount of water to which it is entitled.

(a) Until the rights of the various claimants, parties hereto, including the United States, to divert and use the waters flowing in said river within the area above defined, or to store such water above, with the extent, nature and priority of such rights, have been judicially determined, the United States cannot properly protect its rights to said waters; and to protect them otherwise than is herein sought, if they could be so protected, would necessitate a multitude of suits.

Wherefore the United States prays:

First: That the writ of subpoena issue to each and all of said defendants, and that they be required to answer this complaint and set up fully their claims to the waters of said river within the areas above defined.

Second: That the Court, by its decree, determine the rights of the parties hereto to the waters of said river and its tributaries and the rights of said parties to divert water from said river within the area aforesaid and for storage above, to the end that it may be known how much of said waters [524] may be diverted from said river by the parties hereto and for what purposes, where, by what means of diversion and with what priorities.

Third: That the Court decree to the United States the water rights hereinabove set forth as owned and claimed by the United States, and quiet its title therein, and enjoin said defendants and each of them from interfering therewith, and provide also such means for the carrying out of its decree herein as may be proper.

Fourth: That the United States recover its costs herein and have such other, further and different relief as to the Court may seem just.

And Plaintiff will ever pray.

JOHN G. SARGENT,

The Attorney General of  
the United States.

By EDWARD A. SMITH,

Special Assistant to the  
Attorney General.

[Title of District Court and Cause.]

ADMISSION OF SERVICE OF AMENDED  
COMPLAINT, AND STIPULATION EX-  
TENDING TIME TO ANSWER TO AND  
INCLUDING THE 5TH DAY OF NOVEM-  
BER, 1928.

And come also, by their Attorneys, Francis C. Wilson, A. R. Lynch, and H. A. Elliott,

Virden Irrigation District, situate, lying and being in Hidalgo County, New Mexico, and a de facto Irrigation District under Chapter 41 of the Session Laws of New Mexico, 1919, and Acts amendatory or supplemental thereto;

Sunset Irrigating Canal Company, situate, lying and being in Hidalgo County, New Mexico;

Valley Canal Company, Moddle Canal Company, and Cosper & Windham Canal Company, situate, lying and being in part in Hidalgo County, New Mexico;

Hans Anderson, D. E. Barlow, R. W. Brooks, Bank of Duncan, J. R. Beavers, Florentino Billalba, C. M. Brooks, S. A. Brown, J. L. Crabtree, George Cosper Estate, J. E. Cardon, E. G. Davidson, Byron Echols, M. V. Echols, W. F. Foster, Jasper R. Gale Estate, B. J. Gale, H. Grady, Gila Ranch, Trivio Gonzales, G. Lynn Hatch, M. L. Harris, C. F. Houlihan, Mary J. Jones, D. L. Johnson, John B. Jones, G. W. Johnson, F. W. Jones, M. J. Jones, T. B. Jones, Delbert Johnson, M. J. Jensen, Parley P. Jones, W. E. Jones, R. T. Johns,

Owen Lunt, Anna H. Lunt, A. T. Layton, G. V. Lunt, [526] R. H. Lunt, W. W. Lloyd, P. L. Lunt, M. J. McLaren, E. A. Merrill, Hans Mortensen, T. S. Merrill, F. F. Merrill, O. A. Merrill, Arven Mortensen, Peter Mortensen, J. A. Mortensen, J. A. Mitchell, Hiram K. Mortensen, T. J. Nations, State of New Mexico, W. C. Packer, E. C. Payne, G. O. Payne, C. Pirtel, H. M. Payne, Leslie B. Payne, J. E. Payne, Mrs. J. O. Pace, H. Richardson, M. E. Stewart, Florence R. Swafford, W. F. Shriver, Henry L. Smith, W. P. Tippetts, Peter Wahline, B. Y. Whipple, Mrs. T. M. Williamson, and/or the successor in interest of each of them;

Each of whom is of the defendants named in the above entitled cause and/or a claimant of rights, to water of the Gila River and its tributaries, appurtenant to land situate in Hidalgo County, New Mexico, and included within said Virden Irrigation District, a de facto Irrigation District, as aforesaid, and embraced within the subject matter of this suit, and is a party in interest therein whether named in plaintiff's Amended Complaint or not.

And come also, by their Attorneys Francis C. Wilson, A. R. Lynch, and H. A. Elliott, Greenhorn Ditch Company, Shriver Ditch Company, and Sunset Canal Company, named in plaintiff's Amended Complaint. [527]

And acknowledge, as of the 5th day of October, 1928, service upon each of them of the Amended

Complaint filed in the above entitled cause on the 5 day of Dec, 1927.

**FRANCIS C. WILSON**

Solicitor for the claimants of rights to water of the Gila River and its tributaries appurtenant to land situate in Hidalgo County, New Mexico, above named, and for whom service of plaintiff's Amended Complaint is herein accepted.

**A. R. LYNCH**

**H. A. ELLIOTT**

Solicitors for the claimants of rights to water of the Gila River and its tributaries appurtenant to land situate in Greenlee County, Arizona, and in Hidalgo County, New Mexico, above named and for whom service of plaintiff's Amended Complaint is herein accepted.

[Endorsed]: Filed Oct. 8, 1928. [528]

[Title of District Court and Cause.]

ANSWER TO AMENDED BILL OF  
COMPLAINT

Come now, \* \* \*

Group V.

(Virden Irrigation District)

1. Virden Irrigation District, an irrigation district in the course of incorporation under the laws of the State of New Mexico;

2. Cosper Windham Ditch, an un-incorporated canal company:

J. R. Beavers, R. W. Brooks, George H. Cosper, Jr., Administrator of the Estate of George Cosper, Deceased, E. G. Davidson, R. H. Friestone, O. C. Greenwell, G. Lynn Hatch, M. N. Jensen, R. H. Lunt, Randall Lunt, Administrator of the Estate of Jasper Gale, Deceased, Peter Mortensen, Arven Mortensen, Florence R. Swofford, W. P. Tibbets, Mrs. T. M. Williamson; \* \* \*

5. Sunset Ditch Company, a corporation:

M. M. Allred, Hans Anderson, Florentino Bil-laba, C. M. Brooks, R. W. Brooks, S. A. Brown, J. E. Cardon, Carl Donaldson, M. B. Echols, Byron Echols, W. F. Foster, Gila Ranch Company, a cor-poration, Trivio Gonzales, H. Grady, M. L. Harris, C. F. Houlihan, R. T. Johns, Delbert Johnson, D. L. Johnson, F. W. Jones, J. B. Jones, Mary J. Jones, W. E. Jones, Parley Jones, T. V. Jones, M. J. Jones, G. V. Lunt, P. L. Lunt, Anna Lunt, W. J.

Mabin, F. F. Merrill, O. A. Merrill, J. A. Mitchell, [529] Hans Mortensen, Hiram K. Mortensen, J. A. Mortensen, M. J. McLaren, E. C. Payne, G. I. Payne, H. M. Payne, J. E. Payne, Nancy O. Pace, Leslie B. Payne, Ralph Richardson, Orson Richens, Henry L. Smith, School District No. 2, County of Hidalgo, State of New Mexico, known also as, Virden School, State of New Mexico, Peter Wahline, Virden Ward, B. Y. Whipple; \* \* \*

And answering plaintiff's Amended Bill of Complaint, deny, admit, and aver, as follows:

### I.

Answering paragraph 1 of said Amended Bill of Complaint, these defendants,

Admit that plaintiff brings said Amended Bill of Complaint against the defendants named in said paragraph 1 of said Amended Bill of Complaint.

### II.

Answering paragraph 2 of said Amended Bill of Complaint these defendants,

Admit that the jurisdiction of this Court in this suit depends upon the fact that the United States of America is a party thereto.

### III.

Answering paragraph 3 of said Amended Bill of Complaint, these defendants,

Admit that this suit was brought by plaintiff for itself and as Trustee and Guardian for the Pima and Apache Indians, and that said suit was

instituted at the suggestion of the Secretary of the Interior by direction and authority of the Attorney General of plaintiff. \* \* \*

#### IV.

Answering paragraph 4 of said Amended Bill of Complaint, these defendants, [530]

Admit that Franklin Irrigation District mentioned in sub-paragraph (a) of said paragraph 4 of said Amended Bill of Complaint, is an Irrigation District organized and existing under the laws of the State of Arizona, and has its principal place of business in Greenlee County in the District of Arizona, and that Virden Irrigation District, mentioned in said sub-paragraph (a), is an Irrigation District now in process of organization under and pursuant to Chapter 41, Session Laws of the State of New Mexico, 1919, and upon completion of such organization will become and continue to be a body corporate and politic of said State of New Mexico.

Admit that the persons, canal companies, corporations and associations, mentioned in sub-paragraphs (b) to (k), both inclusive, of said paragraph 4 of said Amended Bill of Complaint, or their successors in interest and for whom answer is herein made, are doing business either in the County of Greenlee, District of Arizona, or in the County of Hidalgo, State of New Mexico, or are residents of either said County of Greenlee or County of Hidalgo. \* \* \*

## XV.

Answering paragraph 15 of said Amended Bill of Complaint, these defendants,

Admit that these defendants claim the right to divert water from the Gila River and the right to store the water of the Gila River, and each of such claims is adverse to the rights claimed by plaintiff in and to the waters of said Gila River, as set forth in said Amended Bill of Complaint.

Deny that said rights claimed by these defendants, if exercised, singly or conjointly, would, and/or when exercised, singly or conjointly, do diminish the water of said Gila River so as to deprive plaintiff of water to which it is lawfully entitled. \* \* \* [531]

5. As to defendant Sunset Ditch Company, a corporation, and the defendants named in paragraph (m) of this part 5,

(a) That in the year 1874 divers settlers, individuals, and citizens of the United States entered in and upon certain lands, being a part of the public domain of the United States in Sections 31, 32, and 33 of Township 18 South, Range 21 West, and in Sections 7, 17, and 18 of Township 19 South, Range 20 West, and in Sections 2, 11, 12, and 13 of Township 19 South, Range 21 West, New Mexico Principal Meridian, in the County of Hidalgo (then Grant), State (then Territory) of New Mexico. That thereafter and from year to year, other settlers, individuals, and citizens of the United States

entered upon certain other lands of said public domain in Section 34 of said Township 18 South, Range 21 West, and in Section 3 of said Township 19 South, Range 21 West, in said County and State. That said entrymen settled upon said lands and instituted the necessary proceedings for the acquisition by them of said lands under the laws of the United States then in force and effect, either by homestead entries, desert land entries, or otherwise; that said entrymen and their successors in interest have complied fully with the laws of the United States relative to the acquisition of such lands, and have acquired and now hold absolute title in fee simple to such lands, whether by patent or mesne conveyance from the original entrymen thereon, as hereinafter particularized in paragraph (m) of this part 5.

(b) That the greater portion of said lands did and do comprise alluvial flats of great agricultural value susceptible of irrigation with the water of the Gila River when diverted from said River by means of the necessary canals and laterals.

(c) That said several entrymen in said year 1874 selected a site upon said Gila River for the diversion therefrom of the water of the Gila River and, constructed from said site of di- [532] version, canals and laterals and thereby and therethrough diverted to and upon said lands, entered and settled upon in said year, 1874, as aforesaid, the water of the Gila River, necessary for the irrigation of said

lands, and thereby intended to and did appropriate the water of the Gila River, necessary for the irrigation of all lands situated in said Sections and susceptible of irrigation with water of the Gila River.

(d) That thereafter and on or about the 6th day of March, 1896, one J. A. Martin, a citizen of the United States and an entryman under the laws of the United States on a portion of said lands in last mentioned Sections, in furtherance of said original appropriation of the year 1874 and for the use and benefit of all of said lands situated in last mentioned Sections, appropriated 50,000 cubic inches, or approximately 21,000 acre feet per annum, of the water of the Gila River to be used for the necessary irrigation of said lands situated in Township 19 South, Range 20 West, and in Township 19 South, Range 21 West, New Mexico Principal Meridian, and in conformity with the laws applicable thereto, posted a notice of said appropriation of said water and intention to divert said water from said Gila River at a place certain designated in said notice, to-wit: at a point on said Gila River 4 chains above the line between Sections 20 and 21 of Township 19 South, Range 20 West, New Mexico Principal Meridian, County of Hidalgo (then Grant), State (then Territory) of New Mexico, and intention to construct and maintain a canal 8 feet wide and 3 feet deep from said point of diversion to and upon last mentioned lands. That said notice

was so posted at said point of diversion and thereafter on the 13th day of May, 1896, filed for record in the office of the County Clerk of Hidalgo (then Grant), State (then Territory) of New Mexico, and placed of record in Book 32, Location Notices, at page 246 thereof, of the official records in the office of said County Clerk. [533]

(e) That said Martin thereafter, with due and reasonable diligence, commenced, and completed, the construction of said canal, known as Sunset Canal, 8 feet in width and 3 feet in depth from said point of diversion through Sections 11 and 7 of said Township 19 South, Range 20 West, and through Sections 12, 1, 2, and 3 of said Township 19 South, Range 21 West, and through Sections 34, 33, 32, and 31 of Township 18 South, Range 21 West, New Mexico Principal Meridian, in said County of Hidalgo (then Grant), State (then Territory) of New Mexico, to and upon said lands, it being the intention that said appropriation and canal were sufficient to satisfy the necessary irrigation requirements of all of said lands, and diverted the water so appropriated through said canal to and upon a considerable portion of said lands for the cultivation and necessary irrigation thereof.

(f) That thereafter and on or about the 8th day of March, 1896, one J. A. Martin, one C. Castlio, and one T. R. Pearson, citizens of the United States and entrymen under the laws of the United States on a portion of said lands designated in paragraph

(a) of this part 5 and for the use and benefit of lands situated in Sections 2, 3, 11, and 12 of Township 19 South, Range 21 West, New Mexico Principal Meridian, appropriated 300 miner's inches, or approximately 4,839 acre feet per annum, of the water of the Gila River, and, in conformity with the laws applicable thereto, posted a notice of said appropriation of said water and intention to divert said water from said Gila River at a place certain designated in said notice, to-wit: the point where the Gila River crosses the North and South center line of Section 18 of Township 19 South, Range 20 West, New Mexico Principal Meridian, in the County of Hidalgo (then Grant), State (then Territory) of New Mexico, and intention to construct and maintain a canal 6 feet in width and 2 feet in depth from said point of diversion of said water to and upon said lands in said Sections 2, 3, 11, and 12 in last mentioned Township 19 South, Range 21 West. That said notice was posted at said point of diversion and thereafter on the 17th day of May, 1898, filed for record in the office of the County Clerk of said County of Hidalgo (then Grant), State (then Terri- [534] tory) of New Mexico, and placed of record in Book 32, Location Notices, at page 623 thereof, of the official records in the office of said County Clerk.

(g) That the said J. A. Martin, C. Castlio, and T. R. Pearson thereafter, with due and reasonable diligence, commenced, and completed, the construc-

tion of said canal, known as M. P. Canal, 6 feet in width and 2 feet in depth from said point of diversion through Section 18 of Township 19 South, Range 20 West, and through Sections 13, 12, 11, 2, and 3 of Township 19 South, Range 21 West, New Mexico Principal Meridian, in said County of Hidalgo (then Grant), State (then Territory) of New Mexico, to and upon said lands, it being the intention that such appropriation and canal were sufficient to satisfy the necessary irrigation requirements of all of said lands in said Sections 2, 3, 11, and 12 of last mentioned Township 19 South, Range 21 West, and diverted the water so appropriated through said canal to and upon a considerable portion of said lands for the cultivation and necessary irrigation thereof.

(h) That thereafter and on or about the 1st day of October, 1896, one Candido Telles, a citizen of the United States and an entryman under the laws of the United States on a portion of said lands designated in paragraph (a) of this part 5, in furtherance of said original appropriation of the year 1874 and for the use and benefit of lands situated in said Sections 18 and 17 of said Township 19 South, Range 20 West, appropriated 17,000 cubic inches, or approximately 7,000 acre feet per annum of the water of the Gila River. That, in conformity with the laws applicable thereto, the said Telles posted a notice of said appropriation of said water and intention to divert said water from said Gila River at a place certain designated in said

notice, to-wit: a point on said Gila River in the Northwest quarter of Section 22, Township [535] 19 South, Range 20 West, New Mexico Principal Meridian, of Hidalgo (then Grant) County, State (then Territory) of New Mexico, and intention to construct and maintain a canal 8 feet in width and one foot in depth from said point of diversion to said lands situated in said Sections 17 and 18 of said Township 19 South, Range 20 West, New Mexico Principal Meridian. That said notice was posted at said point of diversion and on said 1st day of October, 1896, filed for record in the office of the County Clerk of the County of Hidalgo (then Grant), State (then Territory) of New Mexico, and placed of record in Book 32, Location Notices, at page 294 thereof, of the official records in the office of said County Clerk.

(i) That the said Telles thereafter, with due and reasonable diligence, commenced, and completed, the construction of said canal, known as Telles Canal 8 feet in width and 1 foot in depth from said point of diversion through Sections 22, 15, 21, 16, 17, and 18 of said Township 19 South, Range 20 West, New Mexico Principal Meridian, to and upon said lands situated in said Sections 17 and 18 of last mentioned Township 19 South, Range 20 West, it being the intention that said appropriation and canal were sufficient to satisfy the necessary irrigation requirements of all of last mentioned lands, and diverted the water so appropriated through said canal to and upon a considerable por-

tion of said lands for the cultivation and necessary irrigation thereof.

(j) That thereafter and on the 9th day of February, 1903, said entrymen and the then owners of said lands designated in paragraph (a) of this part 5 united in the organization and incorporation of Sunset Ditch Company; that said Sunset Ditch Company now is and at all times since said 9th day of February, 1903, has been a corporation organized under and by virtue of the laws of the State and Territory of New Mexico, and lawfully engaged in [536] the transaction of its corporate business in the State and Territory of New Mexico. That the Articles of Incorporation of said Sunset Ditch Company were filed and placed of record in the office of the County Clerk of the County of Hidalgo (then Grant), State (then Territory) of New Mexico, on said 9th day of July, 1903. That said Sunset Ditch Company was so organized in furtherance of said original appropriation of water of the Gila River in the year 1874, and in furtherance of said appropriation of the water of the Gila River by said J. A. Martin in the year 1896, and in furtherance of said appropriation of the water of the Gila River by said J. A. Martin, C. Castlio, and T. R. Pearson in the year 1896, and in furtherance of the appropriation of water of the Gila River by the said Candido Telles in the year 1896, and for the purpose of providing adequate canals and laterals for the necessary cultivation and irrigation with the water of the Gila River of all of said lands des-

ignated in paragraph (a) of this part 5 and susceptible of irrigation from said Gila River. That Sunset Ditch Company acquired Sunset Canal and said appropriation of the water of the Gila River by the said J. A. Martin, and said M. P. irrigating canal and said appropriation of the water of the Gila River by said J. A. Martin, C. Castlio, and T. R. Pearson, and said Telles Canal and said appropriation of the water of the Gila River by said Candido Telles. That thereafter and on or about the 9th day of February, 1903, said Sunset Ditch Company took over the management and administration and at all times since has managed and administered and, subject to the domination and control of said defendant Virden Irrigation District as herein set forth, does manage and administer all of said appropriations of the water of the Gila River for the use and benefit of the owners and for the cultivation and necessary irrigation of all of the lands designated in paragraph (a) of this part 5, and susceptible of irrigation with the water of the Gila River.

(k) That, beginning with the year 1874, the owners of said lands and of said appropriations of water of the Gila River have used due diligence in the application of said appropriations to said lands and have continuously cultivated said lands from year [537] to year in increasing amounts by the necessary irrigation of the same with the water of the Gila River pursuant to said appropriations thereof, as hereinafter particularized in paragraph

(m) in this part 5, and in connection therewith, have maintained and extended from year to year the said canals and laterals from said point of diversion to and upon said lands as required for the irrigation thereof as aforesaid. That there are now in cultivation as aforesaid of said lands in last mentioned Sections, 1,831.5 acres. That there are and now remain in last mentioned Sections 1,000 additional acres of said lands susceptible of irrigation with the water of said Gila River, pursuant to said appropriations, and which will be reclaimed and placed in cultivation with due and reasonable diligence as rapidly as the water of the Gila River so appropriated shall be available as hereinafter set forth.

(l) That the lands within the last mentioned Sections now cultivated and irrigated and to be cultivated and irrigated, as aforesaid, and said rights of water appropriation are embraced within defendant, Virden Irrigation District, and subject to its management and control.

(m) That the defendant owners of the several parcels of lands situated in last mentioned Sections, the acreage thereof now under cultivation, the Township, Range, and Section in which located, and the year in which the water of the Gila River so appropriated was first applied respectively by said defendants, or their predecessors in interest, to beneficial use upon the several parcels of said land are as follows:

Town-ship South	Range West	Sec-tion	Description	Acres	Defendant
			Year	1874	
*	*	*	*	*	*
Total Acres Sunset					
Ditch Company .....1,831.5					

(n) That each of said defendants named in the preceding [538] paragraph (m) of this part 5, or his predecessors in interest, has appropriated not less than 6 acre feet per annum of said water of the Gila River for the necessary irrigation and cultivation of each acre of his, or its, said respective parcels of land described in last mentioned paragraph (m), and has actually diverted the same continuously from year to year from the date of the first application thereof to and upon his, or its, said land, by means of canals and laterals, for the irrigation and cultivation of his, or its, said lands, and has done all things and taken all steps, as required by the law applicable thereto, to perfect and vest, and thereby there has been perfected and vested in him, or it, his, or its, said appropriation of and right to use said water of the Gila River for the use and benefit of his, or its, said land. That by reason of the climatic conditions and the character and situation of such lands, 6 acre feet per annum per acre are reasonably and necessarily required for the adequate cultivation and irrigation of said lands; that each of said defendants, by virtue of said original appropriation, and the diligent application thereof to beneficial use upon the lands, as

aforesaid, is entitled to 6 acre feet per annum of the water of said Gila River for each acre of said lands so owned, cultivated and irrigated, and that said defendants are entitled in the aggregate to 10,-989.0 acre feet per annum of said water for lands so owned, cultivated, and irrigated, and in addition thereto, 6 acre feet per annum per acre for said 1,000 acres of said lands remaining to be brought into cultivation, as aforesaid, amounting to 6,000 acre feet per annum, or to a grand total of 16,989.0 acre feet per annum, of the water of said Gila River for the use and benefit of said lands in said last mentioned Sections, now cultivated and irrigated and to be cultivated and irrigated thereby.

\* \* \* \* \*

Wherefore, these defendants pray:

First, that the Court, by its decree, determine the rights of the parties hereto in and to the waters of the Gila River, and its [539] tributaries, and the rights of said parties to divert water therefrom, to the end that it may be known, how much of said water, may be diverted from said river by the parties hereto and for what purposes, where and by what means of diversion and with what priorities.

Second, that the Court adjudge and decree, that all laws, orders, rules and regulations of the plaintiff, its officers and departments, wherein and whereby plaintiff, or such officers or departments, have sought to withdraw the public domain, and in particular, the bed and banks of the Gila River,

and its tributaries, as and for the purposes aforesaid, each and every, are, as to these defendants, null and void, and in contravention of the Constitution of the United States of America.

Third, that this Court enjoin this plaintiff, its officers and agents, and each of them, from interfering with defendants or any of them, their officers, employees, or agents in entry upon the public domain of the United States of America and in particular upon the bed and banks of the Gila River, and/or its tributaries, for the purpose of initiating, constructing and maintaining works on said Gila River, and/or its tributaries, for the purpose of utilizing the said rights of said defendants in and to the water of said Gila River, and its tributaries, for the cultivation and necessary irrigation of the lands of said defendants, as aforesaid.

ELLIOTT and SHIMMEL,  
Of Counsel for said  
Defendants.

FRANCIS C. WILSON,  
Solicitor for the defendants  
claimants of rights to water  
of the Gila River and its trib-  
utaries appurtenant to land  
situate in Hidalgo County,  
New Mexico, above named.

H. A. ELLIOTT,  
B. B. SHIMMEL,  
A. R. LYNCH,

Solicitors for the defendants  
claimants of rights to water  
of the Gila River and its trib-  
utaries appurtenant to land  
situate in Greenlee County,  
Arizona, and in Hidalgo  
County, New Mexico, above  
named. [540]

Admit service of the foregoing Answer to  
Amended Bill of Complaint this 5th day of Janu-  
ary, 1929.

JOHN G. SARGENT,  
The Attorney General of the  
United States.

By EDWARD A. SMITH,  
Special Assistant to the  
Attorney General.

[Endorsed]: Filed Jan. 8, 1929. [541]

[Title of District Court and Cause.]

PETITION IN THE MATTER OF THE PROCEEDINGS AGAINST SUNSET CANAL COMPANY, R. W. BROOKS, PARLEY P. JONES, HIRAM PACE, HANS ANDERSON, et al., AND MOTIONS FOR RULE TO SHOW CAUSE.

Comes now your petitioner, Charles A. Firth, and complains of the Sunset Canal Company, Parley P. Jones, R. W. Brooks and Mrs. Rachael Jensen, individually, and as officers and directors of the Sunset Canal Company, and all other parties named in Paragraphs II, III and IV of this petition:

I.

That heretofore there was filed in this Court, on the Equity side thereof, and numbered "Equity 59-Globe", a suit entitled United States of America as plaintiff vs. Gila Valley Irrigation District, et al. as defendants; that said suit was instituted by the plaintiff, United States of America, for the purpose of adjudicating and determining the priority rights to the use of the waters of the Gila River, and the lands thereunder, entitled to water therefrom, and the amounts thereof in so far as the plaintiff and defendants therein named, and they and their successors in interests were concerned, and for the enforcement of the decree of this Court by an injunction.

## II.

That in said suit, the Sunset Canal Company was named defendant therein, for the reason that it had, or claimed, the right to divert, appropriate, distribute and use the waters of said Gila River for the irrigation of land owned and possessed by water users served by the canals, owned or possessed by said company, said defendant being represented in said suit by counsel of record therein. [542]

## III.

That at the time of the institution of said suit Parley P. Jones and R. W. Brooks owned, or were in possession of certain lands under said Sunset Canal Company, which land was fully described and set forth in the decree of this Court, in said suit hereinbefore mentioned, which said lands had been and were irrigated by the waters of the said Gila River supplied through said Sunset Canal Company, and they were then and are now directors of said Sunset Canal Company; that Hiram Pace is a director of said Sunset Canal Company, and owns and is in possession of certain lands irrigated from the waters of the Gila River diverted, apportioned and delivered to said lands by said Sunset Canal Company.

## IV.

That at the time of the institution of said suit, Hans Anderson, M. M. Allred, S. A. Brown, C. M. Brooks, J. R. Beavers, R. W. Brooks, W. E. Bowers, Florentino Billaba, J. E. Cardon, George H.

Cosper, Jr. (Adm. of the estate of George Cosper, deceased), Carl M. Donaldson, E. G. Davidson, M. B. Echols, Byron Echols, W. F. Foster, R. H. Fries-  
stone, Trivio Gonzales, A. C. Gruwell, H. Grandy,  
B. J. Gale, M. L. Harris, G. Lynn Hatch, R. T.  
Johns, Willard E. Jones, John B. Jones, Parley P.  
Jones, T. V. Jones, M. N. Jensen, F. W. Jones,  
Mary Jane Jones, Delbert Johnson, Rachael Jensen,  
Milton N. Jensen, A. E. Keller, G. V. Lunt, Owen  
Lunt, R. H. Lunt, Randall Lunt (Adm. of the estate  
of Jasper Gale, deceased), Maude Larsen, Anna H.  
Lunt, Edward Lunt, P. L. Lunt, Alfred Morten-  
sen, Hiram K. Mortensen, James A. Mitchell, Peter  
Mortensen, O. Mortensen, Hans Mortensen, Fenley  
F. Merrill, Orson A. Merrill, W. J. Mabin, Mitchell  
McDonald, R. J. McLaren, Leslie B. Payne, Nancy  
O. Pace, Junius E. Payne, H. M. Payne, C. Pirtle,  
G. Q. Payne, J. E. Payne (Trustee of the Church  
of Jesus Christ of Latter Day Saints), Helen A.  
Payne, M. D. Patton, E. C. Payne, Ralph [543]  
Richardson, Orsen J. Richens, R. Richens, E. W.  
Richens, Henry L. Smith, Florence R. Swofford,  
Nancy A. Smith, School District #2, County of  
Hidalgo, State of N. M., E. Thygerson, Mrs. T. M.  
Williamson, Peter Wahline, and B. Y. Whipple,  
owned, or were in possession of, certain lands in  
said project, which are more fully described and set  
forth in the decree of said Court in said suit, herein-  
above mentioned, which said lands had been and  
were irrigated by the waters of the Gila River sup-  
plied through the said Sunset Canal Company.

## V.

That thereafter, on June 29, 1935, after due proceedings had been taken therein, a decree of this Honorable Court was made and entered, which decree was approved and signed by all of the parties thereto, or their attorneys of record, which decree determined and set forth the names of the parties entitled to the use of the waters from the Gila River, the points of diversion, the name of the diverting and carrying structure, the description of the lands for which their rights attached, the parties owning said lands when jurisdiction was acquired therein, and the diversion rights. And said decree forever enjoined and restrained each and all of said parties, including all of the parties named herein, who were parties to said suit, and their heirs, successors, administrators and assigns, and all parties to whom rights of water were decreed in said cause, and their assigns and successors in interest, and all parties claiming by, through or under them, their successors from asserting or claiming any right, title or interest in and to said lands or to the waters of the said Gila River, or any part thereof, except the rights specified, determined and allowed by said decree, and each and all of the defendants named in said decree, including the parties herein named, were perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of said Gila River, or any part thereof, except such rights as were set forth

and determined and allowed in said decree of this Court. [544]

## VI.

That after the execution of said decree and in compliance therewith, and before the commission of the acts hereinafter complained of, your petitioner, Charles A. Firth, was duly appointed Water Commissioner by this Court to supervise the distribution of said Gila River waters and to otherwise enforce the terms and conditions of said decree, and he has ever since been, and now is, the duly appointed, qualified and acting Water Commissioner for the purposes set forth in said decree.

## VII.

That reference is hereby made to the original bill and amendments thereto, and exhibits filed, the answer and amended answers of the defendants, the testimony taken on both sides, the stipulation of the parties, including the parties named herein, the final decree in the cause, and each and every other paper and proceeding in this cause from the institution of the suit to the filing of this petition, and to the orders of the Court subsequently entered, pursuant thereto, and more particularly to the order of this Court dated the 9th day of December, 1935, a copy of which is attached hereto and made a part hereof for all purposes, and it is prayed that the same be taken and read as a part hereof at any and all hearings of this petition, whether in this Court or on appeal from any decision in this Court, pursuant to this petition.

## VIII.

Your petitioner herein alleges that the Sunset Canal Company is and, at the times of the commission of the acts herein complained of, was the owner and operator of the Sunset Canal Company, and the canals known as the Cosper Windham Canal Company, and the Cosper Windham Extension Canal Company, all mentioned and described in the aforementioned decree, and diverts and conveys [545] waters from said Gila River; that the other parties, above named and herein complained of, have, or claim to have, some right or interest in and to those certain lands described and set forth in said decree in the name of said parties, or their predecessors in interest, and all of said parties complained of herein, or their successors in interest, claim the right to the use of the waters of the said Gila River upon the said lands, such water being diverted, as hereinbefore described, through the aforesaid canals; That after the entry of said decree, on the 29th day of June, 1935, your petitioner further alleges that all of the parties herein complained of, and their predecessors and successors in interest, recognized and acknowledged said decree and operated thereunder, and for a long time thereafter, complied with all the provisions and conditions thereof.

## IX.

That on the 9th day of December, 1935, the Honorable Albert M. Sames, Judge of the United States

District Court, pursuant to the provisions of said decree, made and entered in said cause a certain order relative to assessments to pay the costs and expenses of the administration of said decree, a copy of which order is hereto attached and made a part hereof and marked "Exhibit A". That all of said costs and expenses for administering said decree for the year 1938, and prior thereto, as provided for in said order have been paid by the parties herein complained of and petitioners and successors in interest. That on or about the first day of January, 1939, and at various and divers times thereafter, affiant made demand on the Sunset Canal Company for the payment of said water assessments levied upon the land owned by the parties herein complained of, or their successors in interest, and located in the State of New Mexico, for the first half of the year 1939, as provided for in said order, and that the said parties have failed and refused [546] to pay such assessments, or any part thereof, and still continue to refuse to pay the same or any part thereof.

## X.

That upon the refusal of all the parties herein complained of, to pay the said water assessments for the first half of the year 1939, as provided for in said order, your petitioner closed and locked the diverting structures and headgates on the Sunset Canal owned by the Sunset Canal Company, and, at said time and at divers times thereafter, your petitioner warned the parties herein complained of not

to divert, appropriate or use any of the waters of the Gila River, as set forth in the aforesaid decree of this Court, until such time as they had paid the water assessments provided for in the order, hereinabove referred to, and had complied with all of the conditions of said decree.

That beginning on January 4, 1939, and ever since said date, said parties complained of and their predecessors and successors in interest, notwithstanding their failure to pay the water assessments, as hereinbefore alleged, have, in violation of the said decree and the said order of this Court, diverted, appropriated and used waters of the Gila River, said water being delivered and distributed to said parties through the canals above named.

## XII.

That on or about January 4, 1939, at the town of Virden, State of New Mexico, and while your petitioner was pursuing his duties as such Water Commissioner, under the decree of this Court, Thomas McClure, C. B. Tooley and John Bradford, Jr., purporting to be officers of the State of New Mexico and claiming that they were acting under the authority of said State of New Mexico, and in its behalf, made demand upon your petitioner to surrender to them the keys to the locks on the control gates and measuring devices, of the aforementioned canals, located in the State of New Mexico; that your petitioner refused to deliver said keys and that, thereupon, the said Thomas McClure, C. B.

Tooley and [547] and John Bradford, Jr., notified your petitioner that they would immediately break said locks and place their own locks upon said gates and measuring devices, and said parties then and there ordered and notified your petitioner to cease his administrative functions, in connection with said Gila River waters in the State of New Mexico, and that, thereafter, a watermaster, appointed by the State of New Mexico, would have full charge of administering the distribution of said waters within the State of New Mexico, and that the distribution of said waters would be administered without regard to the rights of the other parties named in said decree who were not residents of the State of New Mexico or owners of land therein. That thereafter, on the same date, the aforementioned parties wilfully and unlawfully broke, and caused to be broken, the locks on the said measuring devices and replaced same with locks of their own. And, thereupon, opened the gates of the diversion works on the said Sunset Canal thereby causing water to enter said canal and be distributed to the parties herein complained of.

### XIII.

That ever since January 4, 1939, and continuously up to the filing of this petition, the said Thomas McClure, C. B. Tooley and John Bradford, Jr., their agents or representatives, have continued to remain in control of said measuring devices and diversion works, and they have diverted, appropriated

and distributed waters of the Gila River to the parties herein complained of. The said parties herein complained of, notwithstanding their failure to pay the water assessments, as hereinbefore alleged, have ever since January 4, 1939, used, and still continued to use the waters so distributed to them in the irrigation of the respective lands in this petition, hereinbefore mentioned and referred to. That all of the acts, above alleged as having been committed by those parties claiming to be officers of the State of New Mexico, were done and performed under the [548] purported claim that said parties were acting in behalf of and for the benefit of the State of New Mexico, but that your petitioner is informed and believes, and, therefore, alleges that all of such acts of the said parties, as above alleged, were done and performed for and on behalf of and as the agents and representatives of the parties herein complained of, and each and all of them.

#### XIV.

That by reason of the premises, all of the acts of the parties herein complained of, were performed in violation of the provisions of the aforesaid decree and the orders of this Court, duly made and entered in said cause.

Wherefore, your petitioner, Charles A. Firth, prays that a rule issue to each of said parties complained of herein, to show cause why they should not be punished for contempt of this Court for violation of the injunction and provisions of said de-

cree contained, and the orders of said Court made pursuant thereto, and, that upon hearing of said matter, they, and each of them, be punished therefor, and that your petitioner recover his costs and attorneys fees herein expended, and for such other and further relief as the Court may deem meet and just. Your petitioner further prays that the Court fix the manner in which the parties shall be served with process in this proceeding.

FRANK E. FLYNN,

United States Attorney

JOHN C. GUNG'L,

Attorney for Petitioner

H. S. McCLUSKEY,

Of Counsel. [549]

United States of America,  
District of Arizona—ss.

Charles A. Firth, being first duly sworn, deposes and says:

That he has read the above and foregoing petition; that he knows the contents thereof, and that the allegations therein set forth are true of his own knowledge, except as to those matters alleged on information and belief, and as to those matters he believes them to be true.

CHARLES A. FIRTH.

Subscribed and sworn to before me this 1st day of September, 1939.

[Seal]

EDWARD W. SCRUGGS,

Clerk, U. S. District Court.

[550]

**“EXHIBIT A”**

[Title of District Court and Cause.]

**ORDER.**

This cause came on regularly for hearing this 9th day of December, 1935, on order of the Court duly made heretofore for determining the manner and method of providing compensation for the Water Commissioner heretofore appointed by the Court in the above entitled cause, and providing for and authorizing the Water Commissioner to secure assistants, clerical help, office and field equipment. The Court received from the Water Commissioner, C. A. Firth, an estimate of the costs of administering the Gila River decree for the calendar year 1936, a copy of which is attached hereto. The Court having heard counsel for all the principal landowners and the United States Attorney, representing the plaintiff, and being fully advised in the premises,

It is, therefore, ordered that the Water Commissioner establish an office at Safford, Arizona, and he is hereby authorized to employ an assistant for the Duncan and Virden Valley at an annual salary not to exceed \$1500. He is also authorized to employ an assistant for the Safford Valley at an annual salary not to exceed \$1800. He is also authorized to employ an office engineer at an annual salary not to exceed \$2400. The Commissioner is authorized to employ clerical help at approximately \$1800 per year.

The Water Commissioner shall be allowed for his travel expenses and all personal expenses incurred by him as such Water Commissioner the sum of \$1800 per year. He is also authorized to pay to his assistant in the Duncan Valley [551] \$1200 per year as a travel allowance and he is authorized to pay a like allowance to his assistant in the Saf-ford Valley. The Water Commissioner is further authorized to make expenditures specified and indicated in item 3 of his estimate attached hereto.

It is further ordered that all expenses of the Water Commissioner herein authorized shall be paid by the land owners and for that purpose the Water Commissioner is authorized and directed to collect 13¢ for each acre of land for which a water right is given in the decree. The Water Commis-sioner is further directed to collect said 13¢ per acre from each individual, corporation, or party designated in the decree as the party entitled to divert water from the Gila River under the terms thereof and in each instance where the parties en-titled to divert are represented by an irrigation district which is a party to this suit such irrigation district shall be responsible for collecting the said 13¢ per acre and paying it over to the Water Com-missioner. The collection of said 13¢ per acre for the lands represented by the United States, whether Indian or non-Indian, shall be collected by the United States of America, the plaintiff herein.

It is further ordered that all parties, save and except the United States of America, shall pay

their share of the Commissioner's expenses in advance, in two equal installments, the first of which shall be made on February 1, 1936, and a second installment of a like amount on the 1st day of July, 1936. Thereafter, semi-annual payments of equal amounts shall be made on the 1st day of January and the 1st day of July, unless otherwise specified by an order of this Court.

It is further ordered that the expenses of the Water Commissioner payable by the plaintiff, the United States of America, shall be paid by the proper United States Government disbursing officer of the Indian Irrigation Service in 12 equal [552] monthly payments, beginning February 1, 1936, which said payments and which said sums shall all be paid in accordance with Government regulations.

The Water Commissioner is ordered and directed to refuse the delivery of water from the Gila River to any party entitled to divert so long as such diverter remains in default in the payment of any of its share of the said 13¢ per acre.

The Commissioner is further ordered and directed to have each party entitled to divert water from the Gila River install at his or its own expense, adequate and substantial headgates with adequate locking facilities and accurate measuring and automatic recording devices on or before March 1, 1936. He shall advise each such diverter as promptly as possible the size, type and proper location of such headgates and measuring and automatic re-

cording devices as he shall deem proper and when any such party shall notify the Commissioner that he or it is ready to make installation thereof the Commissioner shall supervise such installation to the end that accuracy and economy shall be facilitated.

The Commissioner is further directed to prepare and file with the Court, with copies to the interested parties, a full and complete report, certified under oath, showing the daily quantity of water distributed to the respective users and the conditions under which such water was diverted and used, including diversion rates during the period of his administration of the decree up to and including the 31st day of December, 1936, and annually thereafter unless otherwise directed by the Court. Said report shall contain an analysis of his expenditures during said period, also a tabulation and an analysis of all hydrometric data collected relating to the River during said period.

Done in open Court this 9th day of December, 1935.

ALBERT M. SAMES,

Judge, United States District  
Court, for the District of  
Arizona. [553]

## ESTIMATE OF COST FOR THE ADMINISTRATION OF THE GILA RIVER DECREE FOR THE CALENDAR YEAR OF 1935.

## 1. Personnel (Salaries)

(a) Water Commissioner .....	\$3600.00
(b) Assistant for Duncan and Virden .....	1500.00
(c) Assistant for Safford Valley.....	1800.00
(d) Office Engineer .....	2400.00
(e) Clerical Help .....	1800.00
	\$11,100.00

## 2. Travel Allowance

(a) Water Commissioner .....	\$1800.00
(b) Duncan Assistant .....	1200.00
(c) Safford Assistant .....	1200.00
	\$4,200.00

## 3. Expense :

(a) Office Rent .....	\$ 300.00
(b) Telephone .....	50.00
(c) Office Equipment .....	1000.00
(d) Stationery, Workmen's Compensation, Long Distance Telephones, Telegraph and Miscellaneous .....	1050.00
(e) Current Meters, Hydraulic Rules, Boots, etc.....	1000.00
	\$3,400.00
Total.....	\$18,700.00

On an estimate of 146,562 acres in the Decree with an assessment of 13¢ per acre would net \$19,-053.06.

\* [Endorsed]: Filed Sep. 9, 1939. [554]

[Title of District Court and Cause.]

MOTION FOR RULE TO SHOW CAUSE

In the matter of the proceedings against Hans Anderson, et al.

For Contempt of Court

Comes now Frank E. Flynn, United States Attorney for the District of Arizona, and, as such United States Attorney, moves this Honorable Court for a rule against the above named parties, and each of them, to show cause why they, and each of them, should not be punished for contempt of this Court upon the grounds set forth in the petition heretofore filed by Charles A. Firth, the duly appointed, qualified and acting Water Commissioner in the above-entitled action, which petition is hereby referred to and made a part of this motion.

Dated at Tucson, Arizona, September 9, 1939.

FRANK E. FLYNN,

United States Attorney.

[Endorsed]: Filed Sep. 9, 1939. [555]

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[Title of District Court and Cause.]

ORDER GRANTING MOTION UPON  
CONTEMPT

In the matter of the proceedings against Hans Anderson, et al.

For Contempt of Court

Upon petition of Charles A. Firth, the duly appointed, qualified and acting Water Commissioner

in the above-entitled action, and upon motion of Frank E. Flynn, United States Attorney for the District of Arizona.

It is hereby ordered that a rule be issued on the above-named parties, and each of them, to appear before this Court at Tucson, Arizona, at the hour of 10:00 o'clock A. M., on the 25th day of September, 1939, then and there to show cause, if any there be why they should not be punished for contempt of this Court for the violation of the decree and orders of this Court heretofore made and duly entered in this cause.

It is further ordered that a copy of such rule, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed, be served by the United States Marshal for the District of Arizona upon each of the above-named parties found within the District of Arizona, and due return of said service be filed by the Marshal herein.

It is further ordered that a copy of such rule, together with copy of petition of Charles A. Firth, Water [556] Commissioner, heretofore filed herein, be served by the United States Marshal of the District of New Mexico upon each of the above-named parties found within the said District of New Mexico, and that due return of said service, verified by said United States Marshal be filed herein.

Dated at Tucson, Arizona, September 9th, 1939.

ALBERT M. SAMES,

United States District Judge,  
District of Arizona.

[Endorsed]: Filed Sep 9, 1939. [557]

[Title of District Court and Cause.]

**RULE TO SHOW CAUSE**

In the matter of the proceedings against Hans Anderson, M. M. Brooks, J. R. Beavers, et al.

For Contempt of Court.

The President of the United States of America:  
To Hans Anderson, et al, Greeting:

You and each of you are cited and admonished to appear before the District Court of the United States for the District of Arizona, in the City of Tucson, Arizona, on the 25th day of September, 1939, at the hour of 10:00 o'clock A. M. on said day, and then and there show cause, if any you have, why you, and each of you, should not be punished for contempt of Court for failure to obey and comply with the provisions and conditions of the decree and orders of this Court, heretofore duly made and entered in the above-entitled cause.

It is further ordered that a copy of this order, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed, be served by the United States Marshal for the District of Arizona upon each of the above named parties found within the District of Arizona, and due return of said service be filed by the Marshal herein.

It is further ordered that a copy of this order, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed herein, be served by the United States Marshal of the District of New Mexico upon [558] each of the above-named

parties found within the said District of New Mexico, and that due return of said service verified by said United States Marshal be filed herein.

Witness, the Honorable Albert M. Sames, Judge of said District Court, and my hand and seal of said Court this 9th day of September, 1939.

[Seal]

EDWARD W. SCRUGGS,

Clerk, District Court of the  
United States, District of  
Arizona. [559]

RETURN ON SERVICE OF WRIT

No. E-59-Globe.

United States of America,  
District of Arizona—ss.

I hereby certify and return that I served the annexed Rule to Show Cause on the therein-named R. W. Brooks, Edward Lunt, George H. Cosper, Jr., M. M. Allred and A. C. Gruwell by handing to and leaving a true and correct copy thereof with a true and correct copy of the Rule to Show Cause therein mentioned, to each personally at Duncan and Vicinity in said District on the 11 & 12 day of September, A. D. 1939.

B. J. McKINNEY,

U. S. Marshal.

By JOHN G. SNEDDEN,

Deputy.

Government Printing Office 7-279

[Endorsed]: Filed Sep. 18, 1939. [560]

[Title of District Court and Cause.]

### RULE TO SHOW CAUSE

In the matter of the proceedings against Hans Anderson, M. M. Brooks, J. R. Beavers, et al.

For Contempt of Court.

The President of the United States of America:  
To Hans Anderson, et al., Greeting:

You and each of you are cited and admonished to appear before the District Court of the United States for the District of Arizona, in the City of Tucson, Arizona, on the 25th day of September, 1939, at the hour of 10:00 o'clock A. M. on said day, and then and there show cause, if any you have, why you, and each of you, should not be punished for contempt of Court for failure to obey and comply with the provisions and conditions of the decree and orders of this Court, heretofore duly made and entered in the above-entitled cause.

It is further ordered that a copy of this order, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed, be served by the United States Marshal for the District of Arizona upon each of the above named parties found within the District of Arizona, and due return of said service be filed by the Marshal herein.

It is further ordered that a copy of this order, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed herein, be served by the United States Marshal of the District

of New Mexico upon each of the above-named parties found within the said District of New Mexico, and that due return of said service [561] verified by said United States Marshal be filed herein.

Witness, the Honorable Albert M. Sames, Judge of said District Court, and my hand and seal of said Court this 9th day of September, 1939.

[Seal]

EDWARD W. SCRUGGS,

Clerk, District Court of the  
United States, District of  
Arizona. [562]

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Marshal's Docket No. 1978 Civil

Department of Justice

United States Marshal

District of New Mexico

MARSHAL'S RETURN

I hereby certify and return that on the 22 day of September, 1939, I received a copy of Petition, Order, Order granting Motion Upon Contempt and Rule to Show Cause for Contempt of Court, Service for the District of Arizona, in the case of United States of America vs. Gila Valley Irrigation District, et al. In the Matter of the proceedings against Sunset Canal Company, R. W. Brooks, et al., and motions for Rule to Show Cause, and I served same on:

Maude Larsen (Name)

Bluewater, N. M. (Place)

Sept. 22, 1939 (Date)

## Marshal's Fees:

Service .....	\$2.00
Mileage .....	4.80
Total .....	\$6.80

**FELIPE SANCHEZ Y BACA,**  
**United States Marshal for the**  
**District of New Mexico.**  
**By D. F. MOLLICA,**  
**Deputy. [563]**

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[Title of District Court and Cause.]

I hereby certify that the following named Defendants in the above entitled cause were served on the date, at the place and in the manner hereinafter stated:

W. J. Mabin—9/16/39—Deming, N. M.

E. C. Payne—9/16/39—Lordsburg, N. M.

R. W. Brooks—9/18/39—Virden, N. M. (Director of Sunset Canal Co.)

Byron Echols—9/18/39—Virden, N. M.

G. Lynn Hatch—9/18/39—Virden, N. M.

R. T. Johns—9/18/39—Virden, N. M.

John B. Jones—9/18/39—Virden, N. M.

T. V. Jones—9/18/39—Virden, N. M.

Mary Jane Jones—9/18/39—Virden, N. M.

Milton N. Jensen—9/18/39—Virden, N. M.

Anna H. Lunt—9/18/39—Virden, N. M.

P. L. Lunt—9/18/39—Virden, N. M.

Orson A. Merrill—9/18/39—Virden, N. M.

Orson J. Richens—9/18/39—Virden, N. M.

Ralph Richardson—9/18/39—Virden, N. M.

Florence R. Swofford—9/18/39—Virden, N. M.

Nancy A. Smith—9/18/39—Virden, N. M.

B. Y. Whipple—9/18/39—Virden, N. M.

Hans Mortensen—9/18/39—Virden, N. M.

Carl M. Donaldson—9/18/39—Virden, N. M. (By leaving a copy at his home with his wife)

Rachel Jensen—9/18/39—Virden, N. M. (Individually and as Secretary of the Sunset Canal Company Board)

Finley F. Merrill—9/18/39—Virden, N. M. (Leaving copy with his wife) [564]

Leslie B. Payne—9/18/39—Virden, N. M. (Left Writ at his home with wife)

Junius E. Payne—9/18/39—Virden, N. M. (Left Writ at his home with wife)

H. M. Payne—9/18/39—Virden, N. M. (Left Writ at his home with wife)

J. E. Payne—9/18/39—Virden, N. M. (Individually and as Trustee of the Church of Jesus Christ of the Latter Day Saints)

Hiram Pace—9/18/39—Virden, N. M. (Individually and as a Director of the Sunset Canal) (Left at his home with wife)

School District #2, County of Hidalgo, State of New Mexico, L. B. Payne, Chairman—9/18/39—Virden, N. M.

Parley P. Jones—9/18/39—Virden, N. M. (Individually and as Director of the Sunset Canal Co.) (By leaving Writ with his wife)

Willard E. Jones—9/18/39—Virden, N. M. (By leaving Writ at his home with wife)

R. Richens (Rachel Richens)—9/18/39—Lordsburg, N. M. (By leaving Writ at her home with her daughter, Mrs. Edith Walters)

Henry L. Smith—9/18/39—Virden, N. M. (By leaving Writ at his home with his daughter, Edith Smith)

E. Thygerson—9/18/39—Virden, N. M. (By leaving Writ at his home with his housekeeper, Mrs. P. W. Rynhardt)

FELIPE SANCHEZ Y BACA,  
United States Marshal for the  
District of New Mexico.

By DENNIS RUTLAND,

Deputy. [565]

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[Title of District Court and Cause.]

I hereby certify that the following named defendants in the above entitled cause could not be located in my District, therefore no services were made and according to the best information available in that locality some of the addresses are unknown and some are deceased, as follows:

Hans Anderson—Moved to California.

M. M. Allred—Duncan, Arizona.

S. A. Brown—Deceased.

C. M. Brooks—Deceased.

J. R. Beavers—Deceased.

W. E. Bowers—3726 Morehead St., El Paso,  
Texas.

Florentino Billaba—Deceased.

J. E. Cardon—Moved to Colorado.

George H. Cosper, Jr., Administrator of Estate  
of George Cosper, Deceased—Duncan, Arizona.

E. G. Davidson—Deceased.

M. B. Echols—Deceased.

W. F. Foster—Some place in Arizona.

R. H. Friestone—Deceased.

Trivio Gonzales—Deceased.

A. C. Gruwell—Duncan, Arizona.

H. Grandy—Sheriff at Clifton, Arizona.

B. J. Gale—Deceased.

M. L. Harris—Gone.

N. M. Jensen—Not located.

F. W. Jones—Deceased.

A. E. Keller—Deceased. [566]

G. V. Lunt—Utah & Edward Lunt not located.

Owen Lunt—Deceased.

R. H. Lunt—Morenci, Arizona.

Randall Lunt—Morenci, Arizona (Adm. estate of  
Jasper Gale, Dec.)

Maude Larsen—Bluewater, N. M.—Served by  
Deputy Mollica out of Gallup, N. M.)

Alfred Mortensen—Tucson, Arizona.

Hiram K. Mortensen—Moved to California.

James A. Mitchell—Moved to California.

Peter Mortensen—Deceased.

O. Mortensen—Deceased.

Mitchel McDonald—Deceased.

R. J. McLaren—Deceased.

Nancy O. Pace—Thatcher, Arizona.

C. Pirtle—Moved to California.

G. Q. Payne—El Paso, Texas.

Helen A. Payne—Deceased.

M. D. Patton—Provo, Utah.

E. W. Richens—3211 Idilia St., El Paso, Texas.

Mrs. T. M. Williamson—Duncan, Arizona.

Peter Wahline—Deceased.

Sept. 18, 1939.

FELIPE SANCHEZ Y BACA,

U. S. Marshal, Dist. of N. Mex.

By DENNIS RUTLAND. [567]

[Endorsed]: Filed Oct. 23, 1939. [568]

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[Title of District Court and Cause.]

**MOTION FOR RULE TO SHOW CAUSE**

In the matter of the proceedings against Hans Anderson et al.

For Contempt of Court

Comes now Frank E. Flynn, United States Attorney for the District of Arizona, and, as such United States Attorney, moves this Honorable Court for a rule against Sunset Canal Company, R. W. Brooks, Parley P. Jones, Hiram Pace and Mrs. Rachel Jensen, individually and as officers and

directors of Sunset Canal Company, and each of them, to show cause why they, and each of them, should not be punished for contempt of this Court upon the grounds set forth in the petition heretofore filed by Charles A. Firth, the duly appointed, qualified and acting Water Commissioner in the above-entitled action, which petition is hereby referred to and made a part of this motion.

Dated at Prescott, Arizona, September 14, 1939.

FRANK E. FLYNN,  
United States Attorney.

[Endorsed]: Filed Sep. 14, 1939. [569]

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[Title of District Court and Cause.]

ORDER GRANTING MOTION  
UPON CONTEMPT

In the matter of the proceedings against Hans Anderson et al.

For Contempt of Court

Upon petition of Charles A. Firth, the duly appointed, qualified and acting Water Commissioner in the above-entitled action, and upon motion of Frank E. Flynn, United States Attorney for the District of Arizona.

It Is Hereby Ordered that a rule be issued on Sunset Canal Company, R. W. Brooks, Parley P. Jones, Hiram Pace and Mrs. Rachel Jensen, indi-

vidually and as officers and directors of Sunset Canal Company, and each of them, to appear before this Court at Tucson, Arizona, at the hour of 10:00 A.M., on the 25th day of September, 1939, then and there to show cause, if any there be, why they should not be punished for contempt of this Court for the violation of the decree and orders of this Court heretofore made and duly entered in this cause.

It Is Further Ordered that a copy of such rule, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed, be served by the United States Marshal for the District of Arizona upon each of the above-named parties found within the District of Arizona, and due return of said service be filed by the Marshal herein. [570]

It Is Further Ordered that a copy of such rule, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed herein, be served by the United States Marshal of the District of New Mexico upon each of the above-named parties found within the said District of New Mexico, and that due return of said service, verified by said United States Marshal, be filed herein.

Dated at Prescott, Arizona, September 14, 1939.

ALBERT M. SAMES,  
United States District Judge, District of Arizona.

[Endorsed]: Filed Sep. 14, 1939. [571]

[Title of District Court and Cause.]

RULE TO SHOW CAUSE

In the Matter of the proceedings against Hans Anderson, et al.

For Contempt of Court.

The President of the United States of America:  
To Sunset Canal Company, R. W. Brooks, Parley P. Jones, Hiram Pace and Mrs. Rachel Jensen, individually and as officers and directors of Sunset Canal Company, Greeting:

You and each of you are cited and admonished to appear before the District Court of the United States for the District of Arizona, in the City of Tucson, Arizona, on the 25th day of September, 1939, at the hour of 10:00 o'clock A.M., on said day, and then and there show cause, if any you have, why you, and each of you, should not be punished for contempt of Court for failure to obey and comply with the provisions and conditions of the decree and orders of this Court, heretofore duly made and entered in the above-entitled cause.

It is further ordered that a copy of this order, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed, be served by the United States Marshal for the District of Arizona, and due return of said service be filed by the Marshal herein.

It is further ordered that a copy of this order, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed herein, be

served by the United States Marshal of the District of New Mexico upon each of the above-named parties found within the said District of New Mexico, and that due return of said service verified by said United States Marshal, be filed herein. [572]

Witness, the Honorable Albert M. Sames, Judge of said District Court, and my hand and seal of said Court this 14 day of September, 1939.

[Seal] EDWARD W. SCRUGGS,  
Clerk, District Court of the United States for the  
District of Arizona. [573]

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Department of Justice  
United States Marshal  
District of New Mexico

[Title of Cause.]

I hereby certify that the following *name* defendants, in the above *entitled* cause, were served with rule to show cause, in the matter of proceedings against Hans Anderson et al. for Contempt of Court, on the dates, at the places and in the manner hereinafter stated.

R. W. Brooks, Sept. 21-1939 at Virden N. M. (Individually and as Director of the Sun Set Canal Company.)

Parley P. Jones, Sept. 21-1939 at Virden N. M. (Individually and as Director of Sun Set Canal Company.)

Hiram Pace, Sept. 21-1939, (Individally and as Director of Sun Set Canal Company).

Mrs. *Mrs.* Rachael Jensen, Sept. 21-1939, (Individually and as Secretary of the Sun Set Canal Company).

Sun Set Canal Company, Sept. 21-1939, at Virden N. M. by Serving Parley P. Jones, President of Board of *Disrectors*.

FELIPE SANCHEZ Y BACA,  
U. S. Marshal, Dist. of New Mexico.  
By DENNIS RUTLAND,  
Deputy.

[Endorsed]: Filed Oct. 23, 1939. [574]

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[Title of District Court and Cause.]

AMENDED RETURN TO ORDER TO SHOW  
CAUSE

Comes now R. W. Brooks in his own behalf only and makes this his Amended Return to the Order to Show Cause heretofore issued in the above-entitled matter, and respectfully shows to the court:

1.

That he admits the allegations contained in paragraph 1 of the petition, except that he respectfully alleges and shows to the court that the amended complaint in said cause, in response to which the decree in said cause was entered, and the decree itself discloses that said suit was an action by the plaintiff, the United States of America, to quiet the title of the United States to its claim in and to

the waters of the Gila River in the States of Arizona and New Mexico.

## 2.

Answering paragraph 2, this answering defendant is informed and believes and upon such information and belief alleges and says that there is not now and never has been a corporation known as the Sunset Canal Company engaged in any kind of business whatsoever in the State of New Mexico, nor has any such corporation ever had or claimed the right to divert, appropriate or distribute or use the waters of the Gila River for irrigation of lands owned and possessed by water users, or otherwise, as alleged in paragraph 2 of said petition. [575]

And further answering said paragraph, on information and belief this answering defendant alleges that there was organized in the State of New Mexico for the purpose of acting as common carrier of waters of the Gila River in Hidalgo County, New Mexico a corporation known and designated as the Sunset Ditch Company, but denies that said corporation had any power under its charter to appropriate the waters of said river and denies that it ever attempted so to do, and further alleges and says that the charter of said Sunset Ditch Company was forfeited by an act of the legislature of New Mexico in the year 1921 and has no longer any corporate existence whatsoever, and further that such forfeiture was worked before the date of the decree in this cause and before the date of the filing of the complaint by the plaintiff in this cause, and denies

that there was any corporation in existence at the date of the filing of this suit or at the date of appearance by counsel for said alleged company having corporate existence on said date with power to or which attempted to appropriate waters of the Gila River and denies that the Sunset Ditch Company had any corporate existence at the time of the entry of the decree or at the time that counsel for the defendants in this cause appeared in behalf of the Sunset Ditch Company.

## 3.

Defendant admits that he owned and was in possession of certain lands under the Sunset Canal which were fully described and set forth in the decree of this court, as alleged in paragraph 3 of said petition, which said lands had been and were irrigated by the waters of the Gila River supplied through the Sunset Canal, and further answering said paragraph alleges and says that there was never any corporation existing in the State of New Mexico known as the Sunset Canal Company, nor has this answering defendant ever been a director of the Sunset Canal Company, and further answering said paragraph the defendant says that there has been [576] incorporated under the laws of the State of New Mexico a corporation known as the Sunset Ditch Company, which said corporation forfeited its charter under the laws of the State of New Mexico and by an act of the legislature thereof prior to the date of the institution of this suit and

which said corporation never had power under its charter to appropriate the waters of any river in New Mexico.

4.

This answering defendant denies each and every allegation contained in paragraph 4 of said petition.

Further answering said paragraph this answering defendant denies that any water was ever supplied to anyone by the Sunset Canal Company, or that there ever was a company known as the Sunset Canal Company in the State of New Mexico with power to appropriate the waters of the said river or with any other powers, or that *ny* such named company ever had any corporate existence in the State of New Mexico.

Further answering paragraph 4, on information and belief this answering defendant alleges and shows to the court that the following named defendants were either dead before the date of said decree and before the date of the filing of this action and before the date of their entry of appearance by counsel, or have died, sold their property or moved from the Virden District in Hidalgo County, New Mexico, and did not use or attempt to use any of the waters of the Gila River during the year 1939:

M. M. Allred

J. E. Cardon

George H. Cosper, Jr. (Adm. of the Estate of  
George Cosper, deceased)

W. F. Foster

R. H. Friestone

A. C. Gruwell  
Edward Lunt  
Hiram K. Mortensen  
James A. Mitchell  
W. J. Mabin  
C. Pirtle  
M. D. Patton  
Mrs. T. M. Williamson  
Peter Wahlin  
S. A. Brown  
C. M. Brooks  
J. R. Beavers  
Florentino Billaba  
E. G. Davidson  
M. B. Echols  
Trivio Gonzales  
F. W. Jones  
Delbert Johnson  
A. E. Keller  
Owen Lunt  
Peter Mortensen  
O. Mortensen  
Mitchell McDonald  
R. J. McLaren  
Helen A. Payne [577]

## 5.

This defendant admits the allegations of paragraph 5 of the petition, but denies that this court had jurisdiction of the lands or water rights of the defendants in New Mexico.

## 6.

In answer to paragraph 6, this defendant admits the allegations contained in paragraph 6 of the petition, except that he denies that Charles A. Firth, so far as the lands and waters of the Gila River situated in New Mexico are concerned, was the duly appointed Water Commissioner, and denies that the court had jurisdiction to appoint said Firth to administer any of the water situated outside of the District of Arizona and in the State of New Mexico.

## 7.

In answer to paragraph 7, this answering defendant is advised by counsel and verily believes and therefore alleges that all of the documents referred to in paragraph 7 are immaterial to the issues tendered by the petition in this matter for the reason that the decree and the orders supplementary thereto heretofore made and entered in this cause so far as they affect this answering defendant are void and of no force and effect.

## 8.

In answer to paragraph 8, this answering defendant denies that the Sunset Canal Company is or ever has been the owner and operator of the Sunset Canal, or the owner of the canals known as Cosper Windham or Cosper Windham Extension canal, or that it diverts and conveys water from the Gila River, but admits that this answering defendant claims an interest in and to certain [578] lands

described and set forth in the said decree and in this connection alleges and says that many of the other parties mentioned and described in said paragraph 7, whose names are otherwise set forth in this return, have died or sold out and did not use the waters of the Gila River during the year 1939.

## 9.

In answer to paragraph 9, this answering defendant denies that there has ever existed a corporation known as the Sunset Canal Company described as such in the original decree, or that any canal company ever filed upon or had the right to divert water from the Gila River in New Mexico, and in this connection alleges and says that the rights of the users of the waters of the Gila River in Hidalgo County, New Mexico, are individual rights filed and claimed by the owners thereof and allowed by the State Engineer of the State of New Mexico under and pursuant to the statutes of the State of New Mexico.

## 10.

Answering paragraph 10, this answering defendant denies that any demand was ever made upon him personally for said water assessments mentioned and described in said paragraph, and denies that the Sunset Canal Company or any corporate canal company owns diverting structures or headgates as mentioned and described in paragraph 10 of the petition.

## 11.

Answering paragraph 11, this answering defendant alleges that he is advised by counsel and believes, and therefore charges the fact to be that this court was without jurisdiction to enter said decree regulating the use of the waters of the Gila River and appointing a water master to administer the same outside the jurisdiction of said court and within the jurisdiction of the State of New Mexico, without the consent and against the will of the State of New Mexico. [579]

## 12.

That this defendant is informed and believes and upon such information and belief alleges as follows: that he admits the allegations set forth in paragraph 12 of said petition except that this answering defendant denies that Thomas M. McClure, or any other person, informed the petitioner herein that the waters of the Gila River would be administered without regard to the rights of other parties named in the decree mentioned in said paragraph who are not residents of the State of New Mexico or owners of land therein, and this answering defendant further denies that Thomas M. McClure, C. B. Tooley and John Bradford, Jr., wilfully and unlawfully broke and caused to be broken the locks on the measuring devices and replaced the same with locks of their own, as alleged in said paragraph, but on the contrary alleges and says that Thomas M. McClure is the State Engineer of the State of New

Mexico duly appointed by the Governor of the State of New Mexico and was at the times mentioned and described in said paragraph the duly qualified State Engineer of the State of New Mexico; that C. B. Tooley was at all times mentioned in said paragraph the duly appointed water master of the Gila River in the State of New Mexico; and that John Bradford, Jr., at all times mentioned in said paragraph was a member of the State Police of the State of New Mexico, duly appointed, qualified and acting as such, and further that all the things mentioned and done in paragraph 12 of said petition were done and performed by the said Thomas M. McClure, C. B. Tooley, and John Bradford, Jr., and each of them, acting in their official capacities and under orders of the Chief Executive, the Governor of the State of New Mexico, in his, the said Governor's exercise of the sovereign powers of the State of New Mexico over the Gila River within the boundaries of the State of New Mexico, and further that said [580] Gila River, within the State of New Mexico, is a perennial stream and title to the waters thereof are now and were at all times mentioned in the plaintiff's petition vested in the sovereign State of New Mexico, and that this answering defendant owns and has acquired water rights or the usufruct of the waters of the said river by virtue of his compliance with the appropriation laws of the State of New Mexico and by placing the said waters to beneficial use on his lands in said state.

Further answering said paragraph this answering defendant alleges that Thomas M. McClure, State Engineer of the State of New Mexico, the same person mentioned and described in the plaintiff's petition, exercising his lawful authority under the statutes of the State of New Mexico, made an order on the 31st day of December, 1938, creating a water district on the Gila River, which included the lands and the water rights of this answering defendant, a copy of which order is hereto annexed, marked "Exhibit A," and prayed to be taken as a part of this return, and further that on the same date Thomas M. McClure, the person mentioned and described in said paragraph of the petition then and there in the lawful exercise of his authority under the statutes of the State of New Mexico did make and enter an order appointing C. B. Tooley as water master on the lower Gila River, which included the lands of this answering defendant described in the original decree in this cause, a copy of which order appointing said water master is hereto annexed, marked "Exhibit B," and prayed to be taken as a part of this answer.

### 13.

This answering defendant admits the allegations contained in paragraph 13, except that he denies that Thomas M. McClure, C. B. Tooley and John Bradford, Jr., or either or any of them, acted as his agent, as alleged in said paragraph or [581] otherwise, but on the contrary alleges and says that

said Thomas M. McClure was at all times mentioned in said petition the duly appointed, qualified and acting State Engineer of the State of New Mexico; that C. B. Tooley was at all times mentioned in said petition the duly appointed, qualified and acting water master of the lower Gila River in the State of New Mexico, and that said John Bradford, Jr., was at all times mentioned in said petition a duly appointed, qualified and acting State Police Officer, and that the acts and things done and complained of in paragraph 13 were done under and pursuant to an order of the Governor of the State of New Mexico as Chief Executive of said state in the exercise of the lawful sovereignty of the State of New Mexico over the waters of the Gila River, a perennial stream, a copy of the order under which said Thomas M. McClure, C. B. Tooley and John Bradford, Jr., did and performed the acts complained of in paragraph 13 of said petition, signed by the Governor of the State of New Mexico, and delivered to them and in their possession at the time said acts were done and performed is hereto annexed, marked "Exhibit C," and prayed to be taken as a part of this answer, and this answering defendant specifically denies that said last mentioned persons are now or have ever been his agents, but on the contrary alleges and says that each and all of them are state officers over whom this answering defendant has no power, control or direction now or ever heretofore.

## 14.

That this defendant denies each and every allegation contained in paragraph 14 of said petition, and further denies that this answering defendant ever violated or intended to or attempted to violate any order of this court.

Further answering said petition, this answering defendant respectfully shows to the Court:

## A.

That heretofore, on the 21st day of December, 1938, the [582] New Mexico Interstate Stream Commission, a legal entity under the laws of the State of New Mexico charged and entrusted with the protection, preservation and conservation of the rivers of the State of New Mexico, passed a resolution, a copy of which resolution is hereto annexed, marked "Exhibit D," and prayed to be taken as a part of this answer, and further that on the 28th day of December, 1938, Thomas M. McClure, State Engineer of the State of New Mexico, addressed to the petitioner, Charles A. Firth, to this Honorable Court, and to the Governor of the State of Arizona, a letter inclosing a copy of said resolution, a copy of which letter is hereto attached, marked "Exhibit E," and prayed to be taken as a part of this answer.

## B.

Further answering said petition this answering defendant respectfully shows to the Court that he has never at any time disobeyed any order of this

Court mentioned and described in the petition, or any other order.

C.

Further answering said petition this answering defendant is informed and believes and upon such information and belief states the fact to be that the said Thomas M. McClure and the water master appointed by him under and pursuant to the authority vested in him by the statutes of the State of New Mexico have administered the waters of said river during all the times mentioned and described in the petition in a fair and equitable manner and have released the waters of said river for the use and benefit of residents of the State of Arizona as and when requested by them under and pursuant to the terms of said decree, except that said releases of water were made after the vested rights of water users in the State of New Mexico had first been fulfilled and satisfied.

D.

This answering defendant further shows to the court that it is impossible to enforce the decree in this cause for the reason that this court never obtained jurisdiction of the lands or water rights appurtenant thereto in the State of New [583] Mexico, and further that since the institution of this suit approximately half of the lands and water rights appurtenant thereto described in the decree herein have passed into the hands of, and title has been obtained thereto by, persons not parties to

the decree or to this cause of action, and that said last mentioned persons are entitled at all times to take water from the river without regard to the terms of said decree, and said decree therefore cannot be enforced as to this answering defendant, and further that in the normal process of nature each and all of the above-named defendants, except the Sunset Canal Company (which never existed) and the Sunset Ditch Company (which is already dead) will die and pass beyond the jurisdiction of this court, and inevitably with the lapse of time all the lands will be owned or possessed by persons not bound by this decree, and further that the State of New Mexico, exercising its sovereign jurisdiction over the Gila River, has taken the possession of the administration thereof and administered the same since the 3d day of January, 1939, and C. A. Firth, Water Commissioner, has performed no labor or services to earn the 13¢ per acre fixed by the court's order, and it now appears that the State of New Mexico was not made a party to this cause and is not bound by the decree herein made, and this answering defendant is advised by counsel and alleges that the State of New Mexico is an indispensable party without whose presence as a party defendant in this litigation this court was without power to do complete and final justice without affecting the rights of the State of New Mexico, and said decree lacks finality and further the presence of the State of New Mexico was necessary in equity and good conscience.

Wherefore, this answering defendant respectfully prays to the Court that said petition be dismissed and that this defendant be discharged.

R. W. BROOKS [584]

L. P. McHALFFEY

Lordsburg, New Mexico

H. VEARLE PAYNE

Lordsburg, New Mexico

Albuquerque, New Mexico

A. T. HANNETT

Albuquerque, New Mexico

State of New Mexico,  
County of Hidalgo—ss.

R. W. Brooks, being first duly sworn, upon his oath deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing Return to Order to Show Cause as amended, knows the contents thereof and that the same is true of his own knowledge, except as to those matters alleged on information and belief, and as to those he believes them to be true.

R. W. BROOKS

Subscribed and sworn to before me this 30th day of October, 1939.

[Seal] RUTH E. WOOD,  
Notary Public.

My commission expires: Jan. 3, 1940. [585]

## EXHIBIT A

State of New Mexico,  
County of Santa Fe,  
In the Office of the State Engineer

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In the Matter of a Water District for the Gila  
River Stream System, Hidalgo County, New  
Mexico.

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## ORDER CREATING DISTRICT

This matter coming in for consideration of the State Engineer pursuant to instructions given him by resolution of the Interstate Stream Commission for the State of New Mexico, said resolution being passed at meeting of said Commission on December 21, 1938, and it further

Appearing to the State Engineer that the administration of a certain decree of the United States District Court for Arizona insofar as the State of New Mexico is concerned and its proprietary interests in the waters of the Gila River, that the court acted without jurisdiction, and it is the purpose of the undersigned, to exercise his jurisdiction over the waters of the Gila River in New Mexico;

Now, Therefore, It Is Ordered that all the Gila River System in Hidalgo County, New Mexico, be and the same hereby is created and declared to be a water district known and designated as the Lower Gila River Water District for the purpose of

having the waters of said stream system apportioned and distributed by a water master, as provided by the Statutes of the State of New Mexico.

Done at Santa Fe, New Mexico, this 31st day of December, 1938.

[Seal] (Signed) THOMAS M. McCLURE,  
State Engineer. [586]

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### EXHIBIT B

Office of State Engineer,  
County of Santa Fe,  
Santa Fe, New Mexico

### ORDER APPOINTING WATER-MASTER

I, Thomas M. McClure, State Engineer of the State of New Mexico, by virtue of the authority vested in me by the laws of the state, do hereby appoint C. B. Tooley as Water-Master of the Lower Gila River District, effective the 1st day of January, 1939, for the purpose of administering, carrying out and enforcing the valid water rights of the Gila River within said district; that said Water-Master shall have all the powers and authority with reference to said water in the aforesaid District and the users thereof as are conferred upon a Water-Master under the provisions of Chapter 151, New Mexico Statutes, 1929 Compilation.

In Witness Whereof, I have hereunto set my hand and official seal this 31st day of December, A. D., 1938.

[Seal] (Signed) THOMAS M. McCLURE,  
State Engineer. [587]

## EXHIBIT C

January 3, 1939

To the Chief of Police,  
Santa Fe, New Mexico

Dear Sir:

Pursuant to a resolution heretofore passed by the Interstate Stream Commission, the State Engineer, Mr. Thomas M. McClure, was instructed to take jurisdiction over the administration of the waters of the Gila River, an interstate stream, and it appearing from said resolution and the records of the said Commission in the State Engineer's office and from other evidence placed before me that a certain C. A. Firth and assistants acting under his direction have assumed unlawful jurisdiction over said stream and are attempting to administer the same without authority and are invading the sovereign proprietary interests in the water of said stream of the State of New Mexico, and it further appearing that although requested by the State Engineer, Mr. Thomas M. McClure, to desist from interfering with the waters of said stream and attempting to administer the same that the said C. A. Firth and his said assistants continue to unlawfully interfere with the State's sovereignty in the waters of said river.

You will, therefore, under the direction of Mr. Thomas M. McClure, State Engineer, cause the said C. A. Firth and his assistants to desist from in any manner attempting to interfere with the waters of

said stream and to administer the same and you will also put said Thomas M. McClure, State Engineer of the State of New Mexico in full possession of the facilities for administering the water of said stream and use such force as may be necessary to evict the said C. A. Firth and his assistants or any other persons interfering with the administration of the waters of the said river by the said State Engineer, and you will, therefore, govern yourself accordingly.

Yours very truly,

(Signed)

JOHN E. MILES [588]

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EXHIBIT D  
RESOLUTION

Whereas, it has been brought to the attention of the Interstate Stream Commission that in the United States District Court for the District of Arizona in the case of United States v. Gila Valley Irrigation District, et al., entered June 29, 1935, a commissioner or water master has been appointed who is administering the waters of the Gila River outside the jurisdiction of said court and within the boundaries of the State of New Mexico, and

Whereas, it further appears that the Constitution of the State of New Mexico, by the terms of Section 2, Article 16 provides:

“The unappropriated water of every natural stream, perennial or torrential, within the State

of New Mexico, is hereby declared to belong to to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right."

And it further appearing that neither the United States of America, the State of Arizona, nor any qualified citizen or body corporate of the State of Arizona, nor any of its residents, nor any officers or agents of the United States, have ever filed with the State Engineer of the State of New Mexico any application for, or made appropriation of, the waters of the Gila River, or any of its tributaries as required by the statutes of the State of New Mexico, and

Whereas, it appears that the State of New Mexico was not a party to the litigation and could not be made a party to said litigation wherein said water master was appointed, and it further appearing that said water master is acting, so far as he controls water and performs acts within the State of New Mexico, without lawful authority as against the State of New Mexico and is interfering with the State's sovereignty of its waters within said State, said Gila River being a perennial stream and having a large number of irrigators who have appropriations under the laws of the State of New Mexico, and

Whereas, the interference of said water master so appointed as aforesaid is an invasion of the sov-

ereignty of the State of New Mexico and against the peace and dignity of the State of New Mexico.

Mr. Chavez offered the following resolution and moved its adoption: [589]

“Now, therefore, Be It Resolved that the State Engineer of the State of New Mexico be, and he hereby is, empowered and directed to communicate with the said Commissioner or water master so appointed as aforesaid and advise him to cease interference or exercising any jurisdiction or performing any act touching the use and distribution of the waters of the Gila River within the boundaries of the State of New Mexico, and that upon the refusal of said water master or commissioner to comply with such orders on the part of the State Engineer, the State Engineer be authorized to present this resolution to the Governor of the State of New Mexico, requesting that he exercise his authority as Chief Executive of the State to direct that such measures be taken by the proper officers of the State to enforce this resolution, and the orders of the State Engineer, and

“Be It Further Resolved that a copy of this resolution be sent to the United States District Court for the District of Arizona and to the State Engineer of the State of Arizona.” [590]

## EXHIBIT E

"Dear Sir:

"Pursuant to instructions given me by resolution of the Interstate Stream Commission for the State of New Mexico, a copy of which is annexed to this letter, I am handing said resolution to you.

"I was likewise advised by the Commission and its attorney that it is not the attitude of the Interstate Stream Commission to be contumacious concerning the court's decree in this matter, but that the Interstate Stream Commission is convinced that in the decree so far as the State of New Mexico is concerned and its proprietary interests in the waters of the Gila that the court acted without jurisdiction, and that it is the purpose of the Interstate stream Commission, through the undersigned, to exercise its jurisdiction over the waters of the Gila.

"However, the Interstate Stream Commission and the undersigned believe that an amicable adjustment of the matter can be arranged if a meeting can be held with responsible officials of the two states and the United States representing the Indians and either a compact entered into between the states or some other satisfactory adjustment which will be fair and equitable.

"From the information and investigations made by this department, we have reached the conclusion that the water is not being equitably distributed and that citizens holding prior rights to waters of

the river in this State are being deprived of their rights.

"I wish to assure you in my own behalf and in behalf of the Commission that we would be happy to meet with responsible officials for a discussion of this matter at any time that suits the convenience of such officials.

"Respectfully,"

[Endorsed]: Filed Nov. 1, 1939. [591]

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[Title of District Court and Cause.]

**AMENDED RETURN TO ORDER TO  
SHOW CAUSE**

Come now Carl M. Donaldson, Byron Echols, B. J. Gale, G. Lynn Hatch, R. T. Johns, Willard E. Jones, John B. Jones, Parley P. Jones, T. V. Jones, M. N. Jensen, Mary Jane Jones, Rachel Jensen, Milton N. Jensen, Anna H. Lunt, P. L. Lunt, Hans Mortensen, Fenley F. Merrill, Orson A. Merrill, Leslie B. Payne, Nancy O. Pace, Junius E. Payne, H. M. Payne, J. E. Payne, (Trustee of the Church of Jesus Christ of Latter Day Saints), E. C. Payne, Ralph Richardson, Orson J. Richens, R. Richens, Henry L. Smith, Florence R. Swofford, Nancy A. Smith, School District No. 2, County of Hidalgo, State of New Mexico, E. Thygerson, B. Y. Whipple and Maude Larsen, in their own behalf only and make this their Amended Return to the Order to Show Cause heretofore issued in the above-entitled matter, and respectfully show to the Court:

## 1.

That they admit the allegations contained in paragraph 1 of the petition, except that they respectfully allege and show to the Court that the amended complaint in said cause, in response to which the decree in said cause was entered, and the decree itself discloses that said suit was an action by the plaintiff, the United States of America, to quiet the title of the United States to its claim in and to the waters of the Gila River in the States of Arizona and New Mexico, and purports to adjudicate the title to lands and waters appurtenant thereto [592] belonging to various defendants and situated in the State of Arizona and the State of New Mexico, and purports to bind their successors in interest.

(Paragraph 2 omitted because identical with same numbered paragraph in Brooks return.)

## 3.

Defendants admit that they owned and was in possession of certain lands under the Sunset Canal which were fully described and set forth in the decree of this court, as alleged in paragraph 3 of said petition, which said lands had been and were irrigated by the waters of the Gila River supplied through the Sunset Canal, and further answering said paragraph allege and say that there was never any corporation existing in the State of New Mexico known as the Sunset Canal Company, nor has Parley P. Jones, one of the answering defendants herein, ever been a director of the Sunset Canal

Company, and further answering said paragraph the defendants say that there has been incorporated under the laws of the State of New Mexico a corporation known as the Sunset Ditch Company, which said corporation forfeited its charter under the laws of the State of New Mexico and by an act of the legislature thereof prior to the date of the institution of this suit and which said corporation never had power under its charter to appropriate the waters of any river in New Mexico.

#### 4.

These answering defendants deny each and every allegation contained in paragraph 4 of said petition.

Further answering said paragraph these answering defendants deny that any water was ever supplied to anyone by the Sunset Canal Company, or that there ever was a company known as the Sunset Canal Company in the State of New Mexico with power [593] to appropriate the waters of the said river or with any other powers, or that any such named company ever had any corporate existence in the State of New Mexico.

Further answering paragraph 4, on information and belief these answering defendants allege and show to the court that the following named defendants were either dead before the date of said decree and before the date of the filing of this action and before the date of their entry of appearance by counsel, or have died, sold their property or moved from the Virden District in Hidalgo County, New

Mexico, and did not use or attempt to use any of the waters of the Gila River during the year 1939;

M. M. Allred

J. E. Cardon

George H. Cosper, Jr. (Adm. of the Estate of George Cosper, deceased)

W. F. Foster

R. H. Friestone

A. C. Gruwell

Edward Lunt

Hiram K. Mortensen

James A. Mitchell

W. J. Mabin

C. Pirtle

M. D. Patton

Mrs. T. M. Williamson

Peter Wahlin

S. A. Brown

C. M. Brooks

J. R. Beavers

Florentino Billaba

E. G. Davidson

M. B. Echols

Trivio Gonzales

F. W. Jones

Delbert Johnson

A. E. Keller

Owen Lunt

Peter Mortensen

O. Mortensen

Mitchell McDonald

R. J. McLaren  
Helen A. Payne

Further answering the allegations of paragraph 4, of said petition these answering defendants admit that they owned certain lands as described in said decree at the time of the institution of said suit and allege that said lands were irrigated by the waters of the Gila River which were diverted or caused to be diverted by each respective defendant and conveyed to said lands through a canal known as the Sunset Ditch, which was maintained by the joint efforts of the various land owners using the same.

(Paragraphs 5, 6, 7, 8 omitted because identical with same numbered paragraphs in Brooks return.)

[594]

9.

In answer to paragraph 9, these answering defendants deny that there has ever existed a corporation known as the Sunset Canal Company described as such in the original decree, or that any canal company ever filed upon or had the right to divert water from the Gila River in New Mexico, and in this connection allege and say that the rights of the users of the waters of the Gila River in Hidalgo County, New Mexico, are individual rights filed and claimed by the owners thereof and allowed by the State Engineer of the State of New Mexico under and pursuant to the statutes of the State of New Mexico.

Further answering said paragraph 9, these answering defendants allege that the order mentioned therein made and entered on the 9th day of December, 1935, was void and of no effect as to land and water used by these defendants within the State of New Mexico for the reason that said land and water are and were outside of the territorial jurisdiction of this court.

(Paragraph 10 omitted because identical with same numbered paragraph in Brooks return.)

### 11.

Answering paragraph 11, these answering defendants allege that they are advised by counsel and believe, and therefore charge the fact to be that this court was without jurisdiction to enter said decree regulating the use of the waters of the Gila River and appointing a water master to administer the same outside the jurisdiction of said court and within the jurisdiction of the State of New Mexico, without the consent and against the will of the State of New Mexico.

These answering defendants deny that they have since the 3rd day of January, 1939, diverted or caused to be diverted any waters of the Gila River in violation of the orders of this court but allege that all water diverted from the Gila River for irrigating land in the State of New Mexico subsequent to January 3, 1939, was diverted by and under the direct control of the State of New Mexico by its duly authorized officers as [595] hereinafter more fully alleged.

Paragraphs 12, 13 and 14 A, B and C omitted because identical with same numbered paragraphs in Brooks return.)

## 14 D.

Further answering the allegations of said petition, defendants allege that Maude Larsen, E. Thygerson, J. E. Payne, (Trustee of the Church of Jesus Christ of Latter Day Saints), R. Richens, Nancy A. Smith and B. Y. Whipple, have not since January 1, 1939, owned any land or real estate in New Mexico irrigated by the waters of the Gila River, except town lots in the Village of Virden, Hidalgo County, New Mexico, a municipal corporation. That said defendants have not since January 1, 1939, diverted any waters of the Gila River; that the Village of Virden by and through its officers distributed all waters used for irrigation in the said Village of Virden and that the said water is turned on to the premises of said defendants by the said Village of Virden; that the only water used by said defendants is for the irrigation of small flower and vegetable gardens upon the said town lots.

## E.

Further answering said petition, Defendants allege that H. M. Payne, N. O. Pace, E. C. Payne and Florence Swofford have not personally diverted any of the waters of the Gila River during the year 1939; that all of their lands have been either rented or managed by other persons; that the said Defendant, H. M. Payne, is eighty-two (82) years of age;

that Defendant N. O. Pace is eighty (80) years of age; that these defendants are too old to manage or cultivate real estate and that all lands owned by them in the Gila Valley have been at all times during the year 1939 rented to other persons; that Defendant Florence Swofford is of the approximate age of —— years; that all lands owned by her in the Gila Valley have been [596] managed and cultivated by her children at all times during the year 1939; that Defendant E. C. Payne is a resident of Lordsburg, New Mexico, and has rented all lands owned by him in the Gila Valley and has not personally used the water of the Gila River during the year 1939; that said Defendants, nor any thereof, have not, either in person or by an agent, used, diverted or caused to be diverted any waters of the Gila River contrary to the said decree.

(Paragraph F is identical with paragraph D of Brooks return.)

Wherefore, these answering defendants respectfully pray to the Court that said petition be dismissed and that these defendants be discharged.

PARLEY P. JONES,

L. P. McHALFFEY,

Lordsburg, New Mexico.

H. VEARLE PAYNE,

Lordsburg, New Mexico.

A. T. HANNETT,

Albuquerque, New Mexico.

M. C. MECHEM,

Albuquerque, New Mexico. [597]

State of New Mexico,  
County of Hidalgo—ss.

Parley P. Jones, being first duly sworn, upon his oath deposes and says:

That he is one of the defendants in the above-entitled action; that he has read the foregoing Amended Return to Order to Show Cause, knows the contents thereof and that the same is true of his own knowledge, except as to those matters alledged on information and belief, and as to those he believes them to be true.

PARLEY P. JONES

Subscribed and Sworn to Before Me, this the 1 day of November, A. D. 1939.

[Seal] P. M. JONES,

Notary Public.

My Commission Expires: July 8, 1943.

(Exhibits identical with exhibits in Brooks return)

[Endorsed]: Filed Nov. 6, 1939. [598]

[Title of District Court.]

November 1939 Term

At Tucson

MINUTE ENTRY OF WEDNESDAY,  
FEBRUARY 6, 1940  
(Globe Division)

Honorable Albert M. Sames, United States District  
Judge, Presiding.

[Title of Cause.]

It Is Ordered that the motion to quash Rule to Show Cause and service thereof filed by Parley P. Jones, et al., on November 7, 1939, be denied;

It Is Further Ordered that motion to vacate final decree and orders made pursuant thereto filed by R. W. Brooks in these proceedings November 7, 1939, be denied;

The Court finds that each of the respondents to the Rule to Show Cause, namely, Carl M. Donaldson, Byron Echols, B. J. Gale, G. Lynn Hatch, R. T. Johns, Willard E. Jones, John B. Jones, Parley P. Jones, T. V. Jones, M. N. Jensen, Mary Jane Jones, Rachel Jensen, Milton N. Jensen, Anna H. Lunt, P. L. Lunt, Hans Mortensen, Fenley F. Merrill, Orson A. Merrill, Leslie B. Payne, Nancy O. Pace, Junius E. Payne, H. M. Payne, J. E. Payne (Trustee of the Church of Jesus Christ of Latter Day Saints), E. C. Payne, Ralph Richardson, Orsen J. Richens, R. Richens, Henry L. Smith, Florence R. Swofford, Nancy A. Smith, School District No. 2 County of Hidalgo State of New Mexico, E. Thygerson, B. Y. Whipple and Maude

Larsen; A. C. Gruwell, M. M. Allred, Edward Lunt, George H. Cosper; and R. W. Brooks is guilty of civil contempt as alleged in the Petition of the Water Commissioner filed herein on September 9, 1939, and It Is Ordered that C. A. Firth as Water Commissioner under the decree herein have and recover for his use and benefit as such Water [599] Commissioner in the administration of said decree, of and from each of said respondents severally the sum of one hundred dollars (\$100.00) counsel for said petitioner to prepare serve and file proposed findings of fact and conclusions of law and form of decree;

It Is Further Ordered that all counsel and respondents be and appear before this Court on the 11th day of March, 1940, at Tucson, Arizona, in the court room of this court at the hour of ten o'clock a.m. for the settlement of the findings of fact and conclusions of law and entry of judgment on said petition of the water commissioner and for such further orders as the Court may determine upon in the premises. [600]

[Title of District Court.]

November 1939 Term

At Tucson

MINUTED ENTRY OF FRIDAY

FEBRUARY 9, 1940

(Globe Division)

Honorable Albert M. Sames, United States District  
Judge, Presiding.

[Title of Cause.]

On motion of M. C. Mechem, Esquire,

It Is Ordered that the respondents to the Rule  
to Show Cause in the contempt proceedings herein  
be allowed to February 25, 1940 within which to file  
proposed amendments or additions to the findings  
of fact and conclusions of law proposed by the peti-  
tioner herein. [601]

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[Title of District Court.]

November 1939 Term

At Tucson

MINUTE ENTRY OF SATURDAY,

FEBRUARY 10, 1940

(Globe Division)

Honorable Albert M. Sames, United States District  
Judge, Presiding.

[Title of Cause.]

On motion of John P. Dougherty, Esquire, As-  
sistant United States Attorney,

It Is Ordered that the petitioners in the con-  
tempt proceedings herein be allowed to February 26,

1940 within which to file proposed findings of facts and conclusions of law and form of decree pursuant to the order of the Court entered herein February 6, 1940. [602]

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[Title of District Court.]

November 1939 Term

At Tucson

MINUTE ENTRY OF SATURDAY,  
FEBRUARY 17, 1940  
(Globe Division)

Honorable Albert M. Sames, United States District  
Judge, Presiding.

[Title of Cause.]

On motion of A. T. Hannett, Esquire,

It Is Ordered that the respondents to the Rule to Show Cause in the contempt proceedings be allowed ten days from the date of filing of plaintiff's proposed findings of facts and conclusions of law on the order entered herein February 6, 1940 within which to file objections thereto and proposed findings of facts and conclusions of law. [603]

[Title of District Court.]

November 1939 Term

At Tucson

MINUTE ENTRY OF MONDAY,  
FEBRUARY 26, 1940  
(Globe Division)

Honorable Albert M. Sames, United States District  
Judge, Presiding.

[Title of Cause.]

Motion of A. T. Hannett, Esquire, that these proceedings be dismissed as to the respondent Hiram Pace having been submitted and by the Court taken under advisement, and the Court having duly considered the same and being fully advised in the premises,

It Is Ordered that said motion for dismissal as to said respondent be and it is denied. [604]

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[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW REQUESTED BY RESPONDENTS

Now come the respondents in the above-entitled cause, by their attorneys, and respectfully move the court to make the following findings of fact and conclusions of law:

## Requested Finding of Fact No. 1

That the Gila River is a perennial stream, having its head waters and originating in the State of New Mexico and meandering in a southwesterly direction through the County of Hidalgo, State of New Mexico, and crossing the state line between the States of New Mexico and Arizona into the State of Arizona, traversing a substantial portion of said state and becoming a tributary of the Colorado River.

## Requested Finding of Fact No. 2

That all the lands and water rights owned by the respondents in these proceedings are situated in the County of Hidalgo, State of New Mexico, and outside the Territorial jurisdiction of the United States District Court for the District of Arizona, and that the respondents, and each of them, are citizens and residents of Hidalgo County, New Mexico.

## Requested Finding of Fact No. 3

That the duty of water in Hidalgo County, New Mexico, on the Gila River is six acre feet per annum.

## Requested Finding of Fact No. 4

That the following named respondents did not use any water from the Gila River in Hidalgo County, New Mexico, or else- [605] where from said

river in the year 1939, to-wit:

George H. Cosper

Nancy O. Pace

E. C. Payne

M. M. Allred

Mary Jane Jones

H. M. Payne

A. C. Gruwell

Edward Lunt

#### Requested Finding of Fact No. 5

That since the hearing in these proceedings, as more fully appears from a motion with a death certificate attached heretofore filed herein, Maude Larsen died.

#### Requested Finding of Fact No. 6

That the respondents Junius E. Payne and J. E. Payne are one and the same person, and likewise the respondents Milton N. Jensen and M. N. Jensen are one and the same person.

#### Requested Finding of Fact No. 7

That the following named respondents used water only on city lots in the municipality of the Town of Virden, the said lots having an area of 1.1 acres each, and that said water was delivered to them, and to each of them, by the municipality of the Town of Virden, which said Town was not a party to this cause, acting through a water master appointed by said municipality:

Anna H. Lunt

R. Richens

E. Thygerson

J. E. Payne, (Trustee of the Church of Jesus  
Christ of Latter Day Saints)

Ralph Richardson

Nancy A. Smith

B. Y. Whipple

#### Requested Finding of Fact No. 8

That of the original seventy-five persons named in the rule to show cause in these proceedings and cited for contempt of court herein, the following named persons are either dead or have disposed of their property to third persons:

Hans Anderson

S. A. Brown

C. M. Brooks

J. R. Beavers

W. E. Bowers

Florentino Billaba

J. E. Cardon

Owen Lunt

R. H. Lunt

Maude Larsen

J. Alfred Mortensen

Hiram K. Mortensen

James A. Mitchell

Peter Mortensen [606]

E. G. Davidson

M. B. Echols

W. F. Foster  
R. H. Friestone  
Trivio Gonzales  
H. Grady  
M. L. Harris  
F. W. Jones  
Delbert Johnson  
A. E. Keller  
G. V. Lunt  
Randall Lunt (Administrator of the Estate of  
Jasper Gale, deceased)  
O. Mortensen  
W. J. Mabin  
Mitchell McDonald  
R. J. McLaren  
C. Pirtle  
G. Q. Payne  
Helen A. Payne  
M. D. Patton  
E. W. Richens  
Mrs. T. M. Williamson  
Peter Wahline

and that the total number of acres with water rights appurtenant thereto as disclosed by the original decree herein owned by said last named persons were approximately 1118.7 acres.

#### Requested Finding of Fact No. 9

That the total number of acres served by the Sunset Canal and involved in these proceedings is 2433.7.

**Requested Finding of Fact No. 10**

That the respondent Hiram Pace was not a party to the original suit herein.

**Requested Finding of Fact No. 11**

That no demand was made on any of these respondents for the payment of the thirteen cents per acre, except a demand made on the Sunset Canal Company, which was non-existent.

**Requested Finding of Fact No. 12**

That none of the respondents broke any locks or opened any headgates, or in any way interfered by any personal act of theirs with the administration of the waters of the Gila River or with the duties imposed upon the petitioner, Firth, by the terms of said decree, as charged in the petition.

**Requested Finding of Fact No. 13**

That none of the respondents diverted water from the Gila River in the year 1939, but on the contrary said water was diverted, administered and distributed [607] under the direction of the State Engineer of the State of New Mexico after he had created a water district of the area of land owned by these respondents and others named in the original suit, and said waters were so diverted and administered by a water master appointed by the State Engineer of the State of New Mexico acting under and pursuant to the authority vested in him by the laws of the State of New Mexico.

**Requested Finding of Fact No. 14**

That the acts of the State Engineer of the State of New Mexico, C. B. Tooley and John Bradford, Jr., alleged and complained of in the petition herein, whereby they took possession of the Sunset Canal in the State of New Mexico and diverted and distributed the waters of the Gila River to these respondents and ousted the said C. A. Firth from control of the same, were all done and performed under the direction of the Governor of the State of New Mexico at the instance of the Interstate Stream Commission of the State of New Mexico and in their official capacities, and were not done and performed for and on behalf of, or as agents or representatives of, the respondents herein named.

**Requested Finding of Fact No. 15**

That approximately one-half of the land under the Sunset Canal or ditch is now owned by persons not parties to the original decree or orders issued supplementary thereto.

**Requested Finding of Fact No. 16**

That the following named respondents in the original suit were dead, either before the original suit herein was instituted or before the entry of the decree in the original suit herein, and before the order of December 9, 1935, issued supplementary to the making of said decree: [608]

Florentino Billaba, died in 1931  
E. G. Davidson, died in 1928  
Trivio Gonzales, died in 1933  
F. W. Jones, died in March, 1926  
Owen Lunt, died in January, 1934  
Mitchell McDonald, died in 1933  
C. Pirtle, died in 1927

Requested Finding of Fact No. 17

That the Sunset Ditch Company never did business in the State of Arizona.

Requested Finding of Fact No. 18

That the Sunset Ditch Company was incorporated in the year 1903 under the laws of the Territory of New Mexico, and that on the 14th day of June, 1921, the charter of said corporation was forfeited pursuant to a mandatory statute by action of the State Corporation Commission of the State of New Mexico.

Requested Finding of Fact No. 19

That the Sunset Canal is the only means of diversion and the only canal diverting waters from the Gila River to serve and serving the lands of these respondents and other defendants named in the rule and order to show cause.

Requested Finding of Fact No. 20

That the Sunset Ditch Company or the Sunset Canal Company never owned any land on the Gila

River in Hidalgo County, New Mexico, or appropriated any waters for use on lands nor applied water to beneficial use or any lands in New Mexico.

#### Requested Finding of Fact No. 21

That when the water was turned off from the Sunset canal by the petitioner in October, 1938, and again in January, 1939, it turned off the water from all the users of said ditch including a large number of persons not parties to the original decree in this cause.

#### Requested Finding of Fact No. 22

That C. A. Firth did not make demand upon any of the respondents for acreage assessments to which he claims to be [609] entitled, under and by virtue of the orders and decree of this court, except upon Parley P. Jones, R. W. Brooks and Rachael Jensen, and such demand was made upon them in their alleged official capacity as a committee or directors of the Sunset Canal.

#### Requested Finding of Fact No. 23

That the petitioner, C. A. Firth, performed no services as water commissioner to administer water for the Sunset Canal and these respondents during the year 1939.

#### Requested Finding of Fact No. 24

That no damage to the plaintiff was alleged in the original suit in this cause nor found to be existent.

## Requested Finding of Fact No. 25

That no damage to the plaintiff, United States, or its wards, was alleged to have occurred by any act on the part of these respondents, or the defendants in New Mexico named in the amended complaint, nor was any damage determined to have occurred to the plaintiff or its wards by the terms of the original decree herein. [610]

## CONCLUSIONS OF LAW

## Requested Conclusion of Law No. 1

That it appears from the amended complaint and the original decree in this cause that this suit is an action to quiet title to water rights in New Mexico.

## Requested Conclusion of Law No. 2

That this suit is a naked action to quiet title and null and void as to lands and water rights appurtenant thereto in the State of New Mexico.

## Requested Conclusion of Law No. 3

That the original decree in this cause was a consent decree and in accordance with an agreement between the parties, the court merely exercising an administrative function in recording what had been agreed to between the parties, and upon one of the parties seeking to enforce such decree it is the duty of the court to inquire into the equities and determine whether or not its enforcement would be equitable.

## Requested Conclusion of Law No. 4

That the original decree being a consent decree is not res adjudicata.

## Requested Conclusion of Law No. 5

That this court was without jurisdiction to appoint a water commissioner to administer the waters of the Gila River in the State of New Mexico, and that the appointment of said commissioner was an invasion of the sovereign powers and rights of the State of New Mexico.

## Requested Conclusion of Law No. 6

That this court was without jurisdiction to enforce the performance in New Mexico of the acts required to be performed by its said decree and the orders supplementary thereto.

## Requested Conclusion of Law No. 7

That under the laws and Constitution of the State of New Mexico, water is appurtenant to the lands and becomes real [611] estate upon the compliance with the statutes of the State of New Mexico for the initiation and perfection of water rights.

## Requested Conclusion of Law No. 8

That under the laws and the Constitution of the State of New Mexico and under the statutes of the United States, the State of New Mexico as a sovereign state has such title, ownership or interest in

the waters of the Gila River and such interest in preserving the taxable value of the lands of its people dependent for such value upon irrigation waters from the Gila River, and the interests of the State of New Mexico are so indissolubly linked with the rights of defendant appropriators of water that it was an indispensable party in this cause without whose presence complete justice and a final determination of this said cause could not be had.

#### Requested Conclusion of Law No. 9

That the Governor of the State of New Mexico, the Interstate Stream Commission of the State of New Mexico, and the State Engineer of the State of New Mexico were cloaked and vested with the sovereign powers of the State of New Mexico relative to the control, management and distribution of the waters of the Gila River within the State of New Mexico in the Virden District, and elsewhere on the Gila River in said state, and that the said State Engineer had lawful power and authority to oust the defendant, C. A. Firth, from jurisdiction over the waters of said river and to administer the same for the benefit of the State of New Mexico and its water users holding lawful water rights on the said Gila River which rights were and are exercised under the laws and Constitution of the State of New Mexico for the beneficial use of said [612] waters upon lands located in said State of New Mexico.

## Requested Conclusion of Law No. 10

That the respondents were without power or legal right by assignment, conveyances, or the consent decree herein to alienate or part with title to or the right to use the waters of the Gila River secured to them by virtue of their compliance with the laws of the State of New Mexico, in that by complying with the laws of the State of New Mexico they acquired only the usufruct of the waters of said stream, the basic title and the right to control and dispose of said waters remaining at all times in the State of New Mexico.

## Requested Conclusion of Law No. 11

That the water rights involved herein are owned and possessed by the individual respondents. That the Sunset Ditch, through which the water is carried, is a common carrier and that the water right is not attached to the ditch but is appurtenant to the lands irrigated and that said water rights are owned by the parties in severalty.

## Requested Conclusion of Law No. 12

That the Sunset Ditch Company had no right under the laws of New Mexico to divert water in that it was not the owner of water nor an appropriator thereof.

## Requested Conclusion of Law No. 13

That the service of process on respondents, Hiram Pace, Parley P. Jones, R. W. Brooks and

Rachael Jensen, as alleged directors of the Sunset Canal Company was made upon them outside the territorial jurisdiction of this court in the State of New Mexico and such service is void, and the court did not thereby acquire jurisdiction over them.

#### Requested Conclusion of Law No. 14

That upon the failure of the Sunset Ditch Company to file its annual reports and pay annual fees and upon the action of the State Corporation Commission of New Mexico in forfeiting [613] the charter of the Sunset Ditch Company by virtue of a mandatory statute of New Mexico, the Sunset Ditch Company became civilly dead, and no officer, director or attorney had any power or authority to enter an appearance for it and any judgment rendered against it or any appearance made in its behalf in any court, including the purported entry of appearance in this cause, was void and a nullity, and any judgment or decree in this cause against the Sunset Ditch Company was void on its face and a nullity.

#### Requested Conclusion of Law No. 15

That the decree in this cause is a nullity as to the successors in title of the original defendants, respondents herein, who have died or sold their property since the date of said decree, and further that said decree is a nullity so far as it tends to operate directly on the lands and water rights in New Mexico.

## Requested Conclusion of Law No. 16

The original decree is a nullity so far as it requires the doing of a positive act affecting the water rights and lands in New Mexico by the water commissioner, C. A. Firth.

## Requested Conclusion of Law No. 17

That it does not appear from the complaint in this cause that the defendants had invaded the water rights of the United States, *it* wards, the Indians, described therein, or any water user in Arizona, or had committed any trespass upon said rights or committed any wrong against any right asserted by the plaintiff in this cause or its wards, or any water user in the State of Arizona, nor does it appear from the records in this cause that the plaintiff, or its wards, or any other person in Arizona suffered any damage by reason of any act theretofore committed by any person in New Mexico, including these respondents.

[Endorsed]: Filed Feb 26 1940. [614]

[Title of District Court.]

November 1939 Term At Tucson

MINUTE ENTRY OF MONDAY,

MARCH 11, 1940

(Globe Division)

Honorable Albert M. Sames, United States District  
Judge, Presiding

[Title of Cause.]

This case comes on regularly this day for settlement of findings of facts and conclusions of law and entry of decree pursuant to the order of February 6, 1940.

Frank E. Flynn, Esquire, United States Attorney, and H. S. McCluskey, Esquire, special counsel, appear for the Government. Charles H. Reed, Esquire, appears as counsel for the San Carlos Irrigation District. John C. Gung'l, Esquire, appears as counsel for the Gila Water Commissioner and Geraint Humphries, Esquire, Special Field Counsel, Indian Field Service, is present. M. C. Mecham, Esquire, A. T. Hannett, Esquire, L. P. McHaffey, Esquire, and H. Vearle Payne, Esquire, appear as counsel for the respondents.

On motion of the said United States Attorney,

It Is Ordered that default herein be entered as to the respondent Hiram Pace.

On motion of the said United States Attorney,

It Is Ordered that default herein be entered as to the respondent Sunset Canal Company.

A. T. Hannett, Esquire, now suggests the death of H. M. Payne.

The said United States Attorney now requests that Maude Larsen and H. M. Payne be eliminated from any judgment now entered herein for the reason that said respondents are now deceased.

The said United States Attorney now presents pages [615] 1 and 1a for substitution for page 1 of petitioner's proposed findings of facts heretofore filed herein, and

It Is Ordered that said petitioner be allowed to substitute pages 1 and 1a now presented for page 1 of petitioner's proposed findings of facts heretofore filed herein.

Petitioner's proposed findings of facts and conclusions of law and respondents proposed findings of facts and conclusions of law are now duly argued by respective counsel.

It Is Ordered that the contempt proceedings herein be dismissed as to the respondents Edward Lunt, A. C. Gruwell, M. M. Allred, and George H. Cosper.

On motion of the said United States Attorney,

It Is Ordered that the contempt proceedings herein be dismissed as to the respondent Hiram Pace.

The respondents now renew motion to quash rule to show cause and service thereof and motion to dismiss as to the respondents R. W. Brooks, Parley P. Jones and Rachel Jensen as directors of the Sunset Canal Company,

It Is Ordered that each of said motions be and it is denied.

It Is Ordered that Frank E. Flynn, Esquire, United States Attorney, be allowed to withdraw from the file herein plaintiff's proposed findings of fact and conclusions of law and form of judgment for correction thereof.

The said United States Attorney now presents reengrossed form of findings of fact and conclusions of law and judgment, and It Is Ordered that the same be approved and spread upon the minutes and entered herein as follows: [616]

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[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

That on the 6th, 7th and 9th days of November, 1939 the above-entitled matter came on for hearing before the Court on the petition of C. A. Firth, the Court's Water Commissioner in the above-entitled cause, and on motion of F. E. Flynn, United States Attorney for the District of Arizona, and a rule against the hereinafter named respondents, to show cause why they, and each of them, should not be punished for contempt of Court for violating the terms of the decree entered in the above-entitled cause on the 29th day of June, 1935, and the orders of the Court made in pursuance thereto; and the Court having considered the same and the returns

to said rule; and heard the evidence introduced on behalf of the petitioner and the respondents; and being fully advised in the premises, both as to the law and the facts; and having been requested by the respondents to make written findings and conclusions, does hereby make the following findings of facts and conclusions of law:

## FINDINGS OF FACT

### I.

The above-entitled cause, numbered E-59-Globe, was instituted in this Court by the United States of America, as plaintiff, for itself and as trustee and guardian of the Pima and Apache Indians, to determine their respective rights [617] to the use of the waters of the Gila River, an interstate stream, to irrigate large areas of lands in the Gila River and San Carlos Indian reservations, respectively, in the State of Arizona; that the Gila Valley Irrigation District and others, residents of the State of Arizona, were made defendants in said action, and that the following named respondents, residents of Hidalgo County, State of New Mexico, to-wit:

Sunset Canal Company; R. W. Brooks, Carl M. Donaldson; Byron Echols; B. J. Gale; G. Lynn Hatch; R. T. Johns; Willard E. Jones; John B. Jones; T. V. Jones; Parley P. Jones; Mary Jane Jones; Rachael Jensen; Milton N. Jensen; Maude Larson; Anna H. Lunt; Hans Mortensen; Fenley F. Merrill; Orsen A. Merrill; Leslie B. Payne;

Nancy O. Pace; Junius E. Payne; H. M. Payne; J. E. Payne, Trustee of Church of Jesus Christ of Latter Day Saints; E. C. Payne; Ralph Richardson; Orsen J. Richens; R. Richens; Henry L. Smith; Florence R. Swofford; Nancy A. Smith; School District No. 2, County of Hidalgo, State of New Mexico; E. Thygerson; B. Y. Whipple; M. M. Allred and P. L. Lunt, were defendants in said cause; that they appeared and filed their respective answers and cross-complaints therein and signed a stipulation for judgment and decree; that said respondents were defendants in said cause at the time of the entry of the decree herein.

## II.

That the Sunset Ditch Company was, in 1903, duly incorporated under the laws of the State of New Mexico; that thereafter said corporation took possession of and thereafter managed and operated the Sunset Canal; that at the time the Court acquired jurisdiction in this cause, said corporation was doing business under the name of "Sunset Canal Company" [618] in the states of Arizona and New Mexico, and ever since has been, and now is, doing business under said name; that during all of said time, the officers, agents and representatives of said corporation have acted for said corporation by using the name "Sunset Canal Company", and still continue so to do; that the Sunset Canal Company is identical with the corporation organized and incorporated in 1903, under the laws

of the State of New Mexico under the name of Sunset Ditch Company, and is referred to as a party-defendant herein under both names.

### III and IV.

That Parley P. Jones, R. W. Brooks, Rachael Jensen and Hiram Pace were officers and directors of the Sunset Canal Company during the year 1939.

### V.

That the above respondents named in paragraph I of these findings, with the exception of the Sunset Canal Company, during all of the year 1939, owned or were in possession of certain lands located in Hidalgo County, State of New Mexico, which lands and the respective owners thereof are more fully described in the decree heretofore duly entered herein; that said lands were, during the year 1939, and for a long time prior thereto, irrigated with water diverted from the Gila River in the State of New Mexico, by the respondent, the Sunset Canal Company, and carried by it to said lands through the canal generally and commonly known as the "Sunset Canal".

### VI.

That the Court, having jurisdiction in said suit, received and approved a stipulation of the parties thereto, and entered a final decree in conformity with said stipulation [619] and equity; that all of the respondents, whose names are set forth in

paragraphs I and II hereof, were parties to said stipulation and decree; that said final decree contained an injunction against all parties to said suit and their successors and assigns.

### VII.

That in said stipulation the Court was requested to appoint, and the decree provided for the appointment of a Water Commissioner to carry out and enforce the provisions of the decree, and the instructions and orders of the Court, and if any proper orders, rules or directions of such Water Commissioner, made in accordance with and for the enforcement of the decree, were disobeyed or disregarded, the Water Commissioner was empowered and authorized to cut off the water from the ditch then being used by the person so disobeying such proper orders, rules or directions.

### VIII.

That thereafter the Court appointed C. A. Firth as Water Commissioner and, on December 9, 1935, the Court made and duly entered an order, which said order reads as follows:

“This cause came on regularly for hearing this 9th day of December, 1935, on order of the Court duly made heretofore for determining the manner and method of providing compensation for the Water Commissioner heretofore appointed by the Court in the above entitled cause, providing for and authorizing the Water

Commissioner to secure assistants, clerical help, office and field equipment. The Court received from the Water Commissioner, C. A. Firth, an estimate of the costs of administering the Gila River decree for the calendar year 1936, a copy of which is attached hereto. The Court having heard counsel for all the principal landowners and the United States Attorney, representing the plaintiff, and being fully advised in the premises,

It Is, Therefore, Ordered that the Water Commissioner establish an office at Safford, Arizona, and he is hereby authorized to employ an assistant for the Duncan and Virden Valley at an annual salary not to exceed \$1500. He is also authorized to employ an assistant for the Safford Valley at an annual salary not to exceed \$1800. He is also authorized to employ an office engineer at an annual salary not to exceed \$2400. The Commissioner [620] is authorized to employ clerical help at approximately \$1800 per year.

The Water Commissioner shall be allowed for his travel expenses and all personal expenses incurred by him as such Water Commissioner the sum of \$1800 per year. He is also authorized to pay to his assistant in the Duncan Valley \$1200 per year as a travel allowance and he is authorized to pay a like allowance to his assistant in the Safford Valley. The Water Commissioner is further authorized to make

expenditures specified and indicated in item 3 of his estimate attached hereto.

It Is Further Ordered that all expenses of the Water Commissioner herein authorized shall be paid by the land owners and for that purpose the Water Commissioner is authorized and directed to collect 13¢ for each acre of land for which a water right is given in the decree. The Water Commissioner is further directed to collect said 13¢ per acre from each *individual*, corporation, or party designated in the decree as the party entitled to divert water from the Gila River under the terms thereof and in each instance where the parties entitled to divert are represented by an irrigation district which is a party to this suit such irrigation district shall be responsible for collecting the said 13¢ per acre and paying it over to the Water Commissioner. The collection of said 13¢ per acre for the lands represented by the United States, whether Indian or non-Indian, shall be collected by the United States of America, the plaintiff herein.

It Is Further Ordered That all parties, save and except the United States of America, shall pay their share of the Commissioner's expenses in advance, in two equal installments, the first of which shall be made on February 1, 1936, and a second installment of a like amount on the 1st day of July, 1936. Thereafter, semi-annual payments of equal amounts shall be made

on the 1st day of January and the 1st day of July, unless otherwise specified by an order of this Court.

It Is Further Ordered that the expenses of the Water Commissioner payable by the plaintiff, the United States of America, shall be paid by the proper United States Government disbursing officer of the Indian Irrigation Service in 12 equal monthly payments, beginning February 1, 1936, which said payments and which said sums shall all be paid in accordance with Government regulations.

The Water Commissioner Is Ordered and Directed to refuse the delivery of water from the Gila River to any party entitled to divert so long as such diverter remains in default in the payment of any of its share of the said 13¢ per acre.

The Commissioner Is Further Ordered and Directed to have each party entitled to divert water from the Gila River install at his or its own expense, adequate and substantial headgates with adequate locking facilities and accurate measuring and automatic recording devices on or before March 1, 1936. He shall advise such diverter as promptly as possible the size, type and proper location of such headgates and measuring and automatic recording devices as he shall deem proper and when any such party shall notify the Commissioner that he or it is ready to make installation

thereof the Commissioner shall supervise such installation to the end that accuracy and economy shall be facilitated.

The Commissioner Is Further Directed to prepare and file with the Court, with copies to the interested parties, a full and complete report, certified under oath, showing the daily quantity of water distributed to the respective users and the conditions under which such water was diverted and used, including diversion rates during the period of his administration of the decree up to and including the 31st day of December, 1936, and annually thereafter unless otherwise directed by the Court. Said report shall contain an analysis of his expenditures during said period, also a tabulation and an analysis of all hydrometric data collected relating to the River during said period.

Done in open Court this 9th day of December, 1935.

ALBERT M. SAMES

Judge, United States District  
Court, for the District of  
Arizona."

## IX.

That C. A. Firth qualified, and ever since the 1st day of January, 1936, he has been and now is, the Court's Commissioner, duly authorized and empowered to enforce and carry out the provisions of said decree and order; that thereafter, in accord-

ance with paragraph eight of the aforesaid order, he directed and requested that all parties to said decree, entitled by its provisions to divert water, to install proper headgates, adequate locking facilities, accurate measuring and automatic recording devices; that he so advised and directed the respondent Sunset Canal Company; that from time to time the Water Commissioner issued orders, rules and directions concerning the use of water, in conformity with the provisions of said decree and order.

## X.

That respondent Sunset Canal Company duly installed adequate headgates, adequate locking facilities, and accurate measuring and automatic recording devices, and that it [622] and the other respondents above named operated under and in conformity with the decree and the orders, rules and directions of the Water Commissioner from January 1, 1936, to and including December 31, 1938.

## XI.

That, in accordance with said order, the Water Commissioner duly notified each party entitled to divert water from the Gila River, including respondent Sunset Canal Company, to pay 13¢ per acre for all lands for which it was entitled to divert; that the Sunset Canal Company collected said sum from all the water users under its system, including each of the respondents herein, and paid

said sum to the Water Commissioner for the years 1936, 1937 and 1938.

## XII.

That after the entry of the decree, as found in paragraph VI hereof, the parties to said suit, including the respondents, continued to operate, or cause to be operated, the lands respectively owned or possessed by them; that said respondents since the entry of said decree have continued to irrigate, or cause to be irrigated, their respective lands with water diverted from the Gila River by respondent Sunset Canal Company, and carried to their said lands through the said Sunset Canal; that from January 1, 1936, to and including December 31, 1938, said respondents operated, or caused to be operated, said lands, and irrigated, or caused the same to be irrigated, under and according to the terms and provisions of said decree and the orders of this Court, and abided by and complied with the terms and provisions of said decree and orders of this Court, and the orders, rules and directions duly issued thereunder by the said Water Commissioner.

[623]

## XIII.

That since the entry of said decree, as aforesaid, the respondent Sunset Canal Company operated the said Sunset Canal and diverted water from the Gila River, in the State of New Mexico, and carried said water through said canal to the lands owned or operated by the respondents; that from

January 1, 1936, up to and including December 31, 1938, said Sunset Canal Company operated said canal and diverted water from said Gila River, in the State of New Mexico, and carried same to the lands as aforesaid and to lands in the State of Arizona, in compliance with the terms and provisions of the decree herein, the orders of this Court and the orders, rules and directions of the Water Commissioner; that said Sunset Canal Company, in the operation of said canal, abided by and complied with all of the terms and provisions of said decree, the orders of this Court and the orders, rules and directions of said Water Commissioner.

#### XIV.

That on or about January 1, 1939, demand was duly made on the respondent Sunset Canal Company for the payment of the water assessment levied upon the lands owned or operated by the respondents named in paragraphs I and IV hereof of these findings, for the first half of the year 1939; that said respondent Sunset Canal Company refused to pay the same, or any part thereof, and still continues to fail and refuse so to do; that thereupon, C. A. Firth, said Water Commissioner, closed and locked the diverting structures and measuring devices on the said canal and thereupon directed respondent Sunset Canal Company not to divert any water from the Gila River into the said Sunset Canal for use upon the lands owned or operated by the respondents herein. [624]

**XV.**

(A) That on or about January 4, 1939, said respondents hereinbefore named, and each of them, wilfully and unlawfully broke, or caused to be broken, the locks on said diverting structures and measuring devices and caused other locks to be placed thereon;

(B) That the respondent Sunset Canal Company, and its officers and agents, at all times since the 4th day of January, 1939, have failed and refused to provide adequate locking facilities, or accurate measuring or automatic recording devices, for the use of the Water Commissioner, as provided for in the order of this Court; that said respondent has refused to deliver to the Water Commissioner keys to such locks that were placed on the headgates and recording guages owned by said Sunset Canal Company, and has denied said Water Commissioner access thereto; and that said respondent has refused and failed, and still continues to refuse and fail, to furnish the Water Commissioner information as to the amount of water diverted from the Gila River, by said respondent and delivered to the lands under its system during the calendar year 1939;

(C) That said respondents, and each of them, during the year 1939, denied the right of the Water Commissioner to regulate or control the diversion or distribution of the waters of the Gila River into the Sunset Canal in the State of New Mexico; that during the year 1939, the respondent, Sunset Canal

Company, without paying therefor as provided by the decree and order of this Court, wilfully and wrongfully diverted water from the Gila River in the State of New Mexico, and carried the same through the Sunset Canal to the lands of respondents owning or operating lands in the State of New Mexico, and that such respondents wilfully and wrongfully used said water in irrigating the respective lands owned or operated by them. [625]

## XVI.

That the Water Commissioner, petitioner herein, has been damaged and prejudiced by the acts and conduct of the respondents, as aforesaid, and has incurred extra-ordinary expenses for legal and other assistance in an effort to carry out the decree and orders of the Court; that he has been, and now is, unable to furnish the Court, or the parties to said decree, an accurate and full report of the use of the water from the Gila River for the year 1939.

From the foregoing findings of fact, the Court makes the following conclusions of law:

## CONCLUSIONS OF LAW

1. That this Court had jurisdiction in the premises to make and enter its decree dated June 29, 1935, and its order of December 9, 1935, and all other orders and directions issued pursuant to said decree, and that the Court has jurisdiction of the respondents herein;
2. That said decree and the orders made pursuant thereto were, when made, ever since have

been, and now are, valid, subsisting and binding upon the parties thereto, their grantees, assigns or successors in interest;

3. That at the time of the entry of the decree herein, on the 29th day of June, 1935, the Sunset Canal Company was, ever since has been, and now is, a corporation doing business in the states of Arizona and New Mexico and within the jurisdiction of this Court;

4. That by their acts and conduct, the respondents, Sunset Canal Company; R. W. Brooks; Carl M. Donaldson; Byron Echols; B. J. Gale; G. Lynn Hatch; R. T. Johns; Willard E. Jones, John B. Jones; T. V. Jones; Parley P. Jones; Mary Jane Jones; Rachael Jensen; Milton N. Jensen; Maude Larson; Anna H. Lunt; Hans Mortensen; Fenley F. Merrill; Orsen A. Merrill; Leslie B. Payne; Nancy O. Pace; Junius E. Payne; J. E. Payne, Trustee of Church of Jesus Christ of Latter Day Saints; E. C. Payne; Ralph Richardson; Orsen J. Richens; R. Richens; Henry [626] L. Smith; Florence R. Swofford; Nancy A. Smith; School District No. 2, County of Hidalgo, State of New Mexico; E. Thygerson; B. Y. Whipple; P. L. Lunt have violated the terms of said decree and orders of Court made pursuant thereto; that they have held in contempt the decree and the injunction therein contained, the orders and officer of this Court and that judgment should be entered herein finding and adjudging said respondents, and each of them, guilty of contempt.

Dated at Tucson, Arizona, March 11th, 1940.

ALBERT M. SAMES,

Judge, United States District  
Court for the District of  
Arizona. [627]

DEPARTMENT OF JUSTICE

United States Attorney  
District of Arizona

Phoenix, Arizona.  
February 21, 1940.

I, Ruth Harris, hereby certify that under date of February 17, 1940, I caused to be sent through the United States mails, an envelope addressed to Messrs. Mechem and Hannett, Attorneys at Law, First National Bank Bldg., Albuquerque, New Mexico, and an envelope addressed to Mr. H. Vearle Payne, Attorney at Law, Lordsburg, New Mexico, each containing a copy of the within Findings of Fact and Conclusions of Law, in the case of United States of America, Plaintiff, v. Gila Valley Irrigation District, et al., No. E-59-Globe, in the District Court of the United States for the District of Arizona.

RUTH M. HARRIS

[Endorsed]: Proposed Findings. Filed Feb. 23,  
1940.

[Endorsed]: Findings & Conclusions. Filed Mar.  
11, 1940. [628]

In the District Court of the United States  
for the District of Arizona

No. E-59-Globe

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GILA VALLEY IRRIGATION DISTRICT, et al.,  
Defendants.

### JUDGMENT

In the matter of the petition of C. A. Firth, the Court's Water Commissioner in the above entitled cause, and the motion of F. E. Flynn, United States Attorney for the District of Arizona, and a rule against the hereinafter named respondents to show cause why they, and each of them, should not be punished for contempt of Court for violating the terms of the decree entered in the above entitled cause on the 29th day of June, 1935, and the orders of the Court made in pursuance thereto, the Court, having considered the above entitled matter and the returns to said rule, and heretofore having heard the evidence submitted by the respective parties hereto, and being fully advised in the premises, both as to the law and the facts, and having been requested to, has made and filed its findings of fact and conclusions of law;

Now, Therefore, It Is Hereby Ordered and Adjudged that Sunset Canal Company; R. W. Brooks;

Carl M. Donaldson; Byron Echols; B. J. Gale; G. Lynn Hatch; R. T. Johns; Willard E. Jones; John B. Jones; T. V. Jones; Parley P. Jones; Mary Jane Jones; Rachael Jensen; Milton N. Jensen; Anna H. Lunt; Hans Mortensen; Fenley F. Merrill; Orsen A. Merrill; Leslie B. Payne; Nancy O. Pace; Junius E. Payne; J. E. Payne, Trustee of Church of Jesus Christ of Latter Day Saints; [629] E. C. Payne; Ralph Richardson; Orsen J. Richens; R. Richens; Henry L. Smith; Florence R. Swoford; Nancy A. Smith; School District No. 2, County of Hidalgo, State of New Mexico; E. Thygerson; B. Y. Whipple and P. L. Lunt, and each of them, be, and hereby are, held in contempt of this Court, for which contempt they, and each of them, are hereby fined and assessed in the sum of \$100.00.

It Is Further Ordered and Adjudged that the aforesaid sum of \$100.00 be paid by each of said respondents forthwith to the Clerk of this Court, for the use of said Water Commissioner, C. A. Firth, to be used by him to pay the extraordinary expenses incurred by him in the preparation for and prosecution of respondents in these proceedings; and for such other expenses as the Water Commissioner now has, or may, incur in the administration of said decree.

Done in open Court this eleventh day of March,  
1940.

ALBERT M. SAMES

Judge, United States District  
Court for the District of  
Arizona.

RH

Approved as to form: this 11th day of March,  
1940.

H. VEARLE PAYNE

M. C. MECHEM

Attorneys for respondents ex-  
cept Sunset Canal Company  
and School District No. 2,  
County of Hidalgo, State of  
New Mexico.

[Endorsed]: Judgment. Filed Mar 11 1940. [630]

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[Title of District Court.]

November 1939 Term At Tucson

MINUTE ENTRY OF MONDAY,  
MARCH 11, 1940  
(Globe Division)

Honorable Albert M. Sames, United States District  
Judge, Presiding.

[Title of Cause.]

It is ordered that the supersedeas bond on appeal  
from the judgment on contempt entered herein this  
date be fixed in a sum equal to the total amount of

the judgments entered herein on contempt against the parties who might appeal therefrom and in addition the sum of \$500.00 for costs. [631]

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[Title of District Court.]

October 1939 Term At Phoenix

MINUTE ENTRY OF FRIDAY, MARCH 29, 1940  
(Globe Division)

Honorable Albert M. Sames, United States District  
Judge, Presiding.

[Title of Cause.]

The respondents, R. W. Brooks, et al, having presented to the Court for approval their supersedeas and cost bond on appeal executed on the 26th day of March, 1940, in the sum of \$3,600.00 with the National Surety Corporation of New York as surety thereon.

It is ordered that said bond be and the same is accepted and approved. [632]

In the District Court of the United States  
for the District of Arizona

No. E-59 Globe

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GILA VALLEY IRRIGATION DISTRICT,  
et al.,

Defendants.

C. A. FIRTH,

Petitioner.

NOTICE OF APPEAL TO THE CIRCUIT  
COURT OF APPEALS FOR THE NINTH  
CIRCUIT

Notice is hereby given that R. W. Brooks, Carl M. Donaldson, Byron Echols, B. J. Gale, G. Lynn Hatch, Rachel Jensen, Milton N. Jensen, R. T. Johns, Willard E. Jones, John B. Jones, Parley P. Jones, T. V. Jones, P. L. Lunt, Fenley F. Merrill, Orson A. Merrill, Hans Mortensen, Leslie B. Payne, Orsen J. Richens, Henry L. Smith, Florence R. Swofford, Mary Jane Jones, Anna H. Lunt, Nancy O. Pace, Junius E. Payne, J. E. Payne, Trustee of the Church of Jesus Christ of Latter Day Saints; E. C. Payne, Ralph Richardson, R. Richens, Nancy A. Smith, E. Thygerson, B. Y. Whipple, respondents in the above-entitled cause, hereby appeal to

the Circuit Court of Appeals for the Ninth Circuit from the judgment of contempt and fine thereon, heretofore entered in the above cause.

H. VEARLE PAYNE,

Lordsburg, N. M.

L. P. McHALFFREY,

Lordsburg, N. M.

M. C. MECHEM,

Albuquerque, N. M.

A. T. HANNETT,

Albuquerque, N. M.

Attorneys for Appellants. [633]

[Endorsed]: Filed Apr 9 1940. [634]

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[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED  
UPON BY RESPONDENTS, TOGETHER  
WITH DESIGNATION OF PARTS OF  
RECORD.

Pursuant to Rules of Civil Procedure for the District Courts of the United States, respondents make the following statement of points upon which they intend to rely in the appeal, together with designation of the parts of the record necessary for the consideration thereof:

Point I

It appears from the amended complaint and the original decree in this cause that this suit is a naked action to quiet title and null and void on its

face as to lands and water rights appurtenant thereto in the State of New Mexico.

### Point II

It does not appear from the complaint in this cause that the defendants had invaded the water rights of the United States, its wards, the Indians, described therein, or any water user in Arizona, or had committed any trespass [635] upon said rights or committed any wrong against any right asserted by the plaintiff in this cause or its wards, or any water user in the State of Arizona, nor does it appear from the records in this cause that the plaintiff, or its wards, or any other person in Arizona suffered any damage by reason of any act theretofore committed by any person in New Mexico, including these appellants.

### Point III

That the original decree in this cause was a consent decree and in accordance with an agreement between the parties, the court merely exercising an administrative function in recording what had been agreed to between the parties, and upon one of the parties seeking to enforce such decree it is the duty of the court to inquire into the equities and determine whether or not its enforcement would be equitable; and further, that the original decree, being a consent decree, is not res judicata.

### Point IV

That the court was without jurisdiction to appoint a water commissioner to administer the wat-

ers of the Gila River in the State of New Mexico, and that the appointment of said commissioner was an invasion of the sovereign powers and rights of the State of New Mexico.

### Point V

The court was without jurisdiction to enforce the performance of positive acts by its water commissioner required to be performed by its said decree and orders supplementary thereto affecting water rights and controlling the distribution of water in the State of New Mexico. [636]

### Point VI

That under the laws and Constitution of the State of New Mexico water is appurtenant to the lands and becomes real estate upon the compliance with the statutes of the State of New Mexico for the initiation and perfection of water rights.

### Point VII

That under the laws and the Constitution of the State of New Mexico and under the statutes of the United States, the State of New Mexico as a sovereign state has such title, ownership or interest in the waters of the Gila River and such interest in preserving the taxable value of the lands of its people dependent for such value upon irrigation waters from the Gila River, and the interests of the State of New Mexico are so indissolubly linked with the rights of defendant appropriators of water that it was an indispensable party in this cause without

whose presence complete justice and a final determination of this said cause could not be had.

### Point VIII

That the Governor of the State of New Mexico, the Interstate Stream Commission of the State of New Mexico, and the State Engineer of the State of New Mexico were cloaked and vested with the sovereign powers of the State of New Mexico relative to the control, management and distribution of the waters of the Gila River within the State of New Mexico in the Virden District, and elsewhere on the Gila River in said state, and that the said State Engineer had lawful power and authority to oust the defendant, C. A. Firth, from jurisdiction over the waters of said river and to administer the same for the benefit of the State of New Mexico and its water users holding lawful water rights on the said Gila River, [637] which rights were and are exercised under the laws and Constitution of the State of New Mexico for the beneficial use of said waters upon lands located in said State of New Mexico.

### Point IX

That the respondents were without power or legal right by assignment, conveyances, or the consent decree herein to alienate or part with title to or the right to use the waters of the Gila River secured to them by virtue of their compliance with the laws of the State of New Mexico, in that by complying with the laws of the State of New Mexico they acquired

only the usufruct of the waters of said stream, the basic title and the right to control and dispose of said waters remaining at all times in the State of New Mexico.

#### Point X

That the water rights involved herein are owned and possessed by the individual respondents. That the Sunset Ditch, through which the water is carried, is a common carrier and that the water right is not attached to the ditch but is appurtenant to the lands irrigated and that said water rights are owned by the parties in severalty.

#### Point XI

That the Sunset Ditch Company had no right under the laws of New Mexico to divert water in that it was not the owner of water nor an appropriator thereof.

#### Point XII

That the service of process on respondents, Hiram Pace, Parley P. Jones, R. W. Brooks and Rachael Jensen, as alleged directors of the Sunset Canal Company was made upon them [638] outside the territorial jurisdiction of the court in the State of New Mexico and such service is void, and the court did not thereby acquire jurisdiction over them.

#### Point XIII

That upon the failure of the Sunset Ditch Company to file its annual reports and pay annual fees and upon the action of the State Corporation Com-

mission of New Mexico in forfeiting the charter of the Sunset Ditch Company by virtue of a mandatory statute of New Mexico, the Sunset Ditch Company became civilly dead, and no officer, director or attorney had any power or authority to enter an appearance for it and any judgment rendered against it or any appearance made in its behalf in any court, including the purported entry of appearance in this cause, was void and a nullity, and any judgment or decree in this cause against the Sunset Ditch Company was void on its face and a nullity.

#### Point XIV

That the decree in this cause is a nullity as to the successors in title of the original defendants, respondents herein, who have died or sold their property since the date of said decree, and further that said decree is a nullity so far as it tends to operate directly on the lands and water rights in New Mexico.

#### Point XV

The court erred in refusing to permit the respondents to introduce proof that by reason of the acts of the Water Commissioner, C. A. Firth, appointed in this cause, in his control and regulation of the diversion of waters of the Gila River into the Sunset Canal during the year 1938 and [639] thereby depriving them of the use of said water, that they and other water right owners under said ditch not parties to this cause suffered great loss and damage.

### Point XVI

The court erred in refusing to permit the respondents to introduce proof that during the year 1938 they were, by the water commissioner, C. A. Firth, deprived of water flowing in the Gila River at the headgate of the Sunset Ditch which would have saved their crops and prevented them from suffering damage, and that said water which was denied them but was permitted to flow down the bed of the Gila River was lost and was of no benefit to the water users on the Gila River in the State of Arizona.

### Point XVII

The court erred in refusing to permit the respondents to introduce proof that in the year 1939 the water diverted by the State Engineer of the State of New Mexico to the respondents and other water right owners under the Sunset Ditch, and which was placed to beneficial use by them, would not and could not have reached the dam of the plaintiff at Coolidge, Arizona, and that it would not have and could not have benefited any water users in the State of Arizona, and further that according to the terms of the decree, had they been enforced and interpreted by C. A. Firth, the water commissioner appointed by the court, and as operated by him in previous years, and had not the State Engineer of the State of New Mexico taken charge of and administered the waters of the Gila River to these respondents in the year 1939, all vegetation, including alfalfa, fruit trees and annual crops of

the respondents and other persons not parties to said [640] cause but owners of land and water rights under said Sunset Ditch would have been destroyed.

### Point XVIII

The court erred in refusing to permit said respondents to introduce evidence to prove that the water of the Gila River alleged to have been diverted and used by them in violation of the decree and orders made pursuant thereto would not have benefited plaintiff and Arizona water users if it had not been so diverted and used, and that without said diversion and use the respondents and other water users under the Sunset Ditch would have lost their crops and would have suffered great loss and damage.

### Point XIX

The court erred in refusing to permit the plaintiff to introduce proof that the State Engineer of the State of New Mexico is the custodian of the public records showing the existence of all rights to appropriate waters in the State of New Mexico which are valid and subsisting, including those of all water users in the Virden Irrigation District, Hidalgo County, New Mexico, being the lands and water rights described in the decree on file herein, and that all of said water rights and appropriations in the State of New Mexico were made by and are now owned and held by individuals, and no corporation is the owner or holder of any said water rights or the right to divert water from the said Gila

River, as shown by the records in the State Engineer's office of the State of New Mexico.

### Point XX

The court erred in refusing to permit the respondents [641] to introduce evidence to prove that numerous defendants, owners of lands and water rights described in the decree, who were shown by the record to have appeared in this cause and to have consented to the entry of the decree, were dead at the time they are shown to have appeared or at the time they are shown to have consented to said decree.

### Point XXI

The Court erred in refusing to permit the respondents to introduce evidence to prove

A. That more than fifty per cent of the area of the land and water rights in New Mexico described in the decree herein as owned by defendants named in said decree is now owned and irrigated by third persons who were not parties to said decree.

B. That there is but one canal, to-wit, the Sunset Canal, serving respondents and the said persons who are not parties to this proceeding owning lands and water rights under said canal and from which they are entitled to receive water for the irrigation of their said lands, and that the water master appointed in this cause cannot regulate the diversion and distribution of water under said decree to the respondents according to their rights under said decree without depriving the water right owners

who were not parties to said decree of their rights to water granted them by their New Mexico appropriations.

#### Point XXII

The court erred in denying the motion of Hiram Pace, respondent, to dismiss the petition herein and quash the rule to show cause and quash the service of said rule upon him. [642]

#### Point XXIII

The court erred in denying the motion of Parley P. Jones, Hiram Pace, R. W. Brooks and Rachael Jensen, to dismiss the petition herein, quash the rule to show cause which had been issued herein, and quash the service of said rule upon them as directors of the Sunset Canal Company.

#### Point XXIV

The court erred in overruling the motion of all of the respondents to vacate the final decree made and entered herein on June 29, 1935, and all orders pursuant thereto so far as said decree and orders purport to determine the priority of said water rights and to regulate and control the diversion of said waters of the Gila River and the use and enjoyment thereof by these defendants in the State of New Mexico.

#### Point XXV

The court erred in overruling the motion of the respondents to vacate said decree because it does not appear from the amended complaint or from

said decree that at the time this suit was brought the United States in its own behalf or in behalf of anyone else was in the present use and enjoyment of the waters, title to which is sought to be quieted.

#### Point XXVI

The court erred in denying the motion of the respondents that the court require the plaintiff to assume the burden of establishing the equity and fairness of the consent decree.

#### Point XXVII

The court erred in ruling that the burden of proof was upon the respondents to prove that they were not guilty of [643] the charges of contempt made against them.

#### Point XXVIII

The evidence before the court does not show that the respondents, or any of them, failed or refused to obey, or disobeyed any order, injunction or decree of the court.

#### Point XXIX

The evidence fails to show that the respondents, Mary Jane Jones and Nancy O. Pace, used water from the Gila River in the year 1939.

#### Point XXX

The fine imposed of \$100.00 each on the respondents is for a round sum of money not based upon any proved item or items of expense, but intended to cover probable losses and expense and that if

imposed by way of indemnity to the petitioner it should not exceed his actual loss incurred by the violation of the injunction, including the expense of the proceedings necessitated in presenting the offense for the judgment of the court, and is not based upon evidence showing the amount of loss and expense, and the sum of \$100.00 is necessarily arbitrary, arrived at by conjecture, and that the said fine is punitive and not remedial.

### Point XXXI

If failure to pay the thirteen cents per acre constitutes contempt, the only relief the trial court could have granted the petitioner was to imprison the respondents until they had paid said thirteen cents per acre. [644]

### DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The parts of the record necessary for the consideration of the points relied upon are as follows:

1. Stipulation, dated April 9th, 1940.
2. Include all of petition of Charles A. Firth, and exhibits referred to therein, in the matter of the proceedings against Sunset Canal Company et al.
3. Include all of the motion for rule to show cause, in the matter of the proceedings for contempt, omitting the names of all defendants except "Hans Anderson" and adding the words "et al."
4. Include all of the order granting motion for

contempt, omitting the names of all defendants except "Hans Anderson" and adding the words "et al."

5. Include all rules to show cause in the contempt proceedings, omitting the names of all defendants except "Hans Anderson" and adding the words "et al."

6. Include all of the amended return of R. W. Brooks to order to show cause.

7. Include all of the amended return of Carl M. Donaldson et al., respondents, except the following: omit paragraphs 2, 5, 6, 7, 8, 10, 12, 13, 14 A, B and C, and inserting in lieu thereof "paragraphs omitted because identical with same numbered paragraphs in Brooks return"; omit paragraph F and insert "identical with paragraph D of Brooks return"; omit all exhibits and insert "exhibits identical with exhibits in Brooks return."

8. Include minute orders showing dates of filing original complaint, amended complaint, acceptance of service by respondents, and answer to amended complaint filed by Franklin Irrigation District et al., filed January 8, 1929.

9. Include all minute entries pertaining to these [645] proceedings subsequent to February 5, 1940, except the minute entries as to the swearing of witnesses.

10. Include findings of fact and conclusions of law.

11. Include respondents' proposed findings of fact and conclusions of law.

12. Include judgment.

13. The following parts of the amended complaint:

- (a) Include caption;
- (b) Include first four lines of page 1, down to and including the words "Gila Valley Irrigation District" and adding the words "et al.", and omit the balance of page 1, pages 2, 3, 4, 5 and the first three lines on page 6;
- (c) Include beginning with "Virden Irrigation District", line 4, to and including "D. Y. Whipple", at the end of line 26, page 6;
- (d) Omit balance of pages 6, 7, 8, 9, 10 and the first seven lines on page 11, ending with "Elsie De Wolf Zellweger", and insert, as per stipulation of the parties, the following:

"The complaint in paragraph I, in addition to the foregoing, named as defendants some 40 canal or ditch companies and irrigation districts and approximately 1500 defendants, comprising municipal corporations, school districts, corporations and persons, residents of Arizona and New Mexico, who are not Indians or wards of the United States or represented by the United States."

Include lines 8 and 9, on page 11.

- (e) Include paragraphs 2 and 3 in full;
- (f) The following parts of paragraph 4:
  1. Include sub-paragraph a;
  2. Omit sub-paragraph (b);
  3. Omit all of sub-paragraph (c) except:

"That certain others of said defendants, to-wit: \* \* \* Sunset Canal Company, Sunset Irrigation Canal Company \* \* \* are corporations doing business in Greenlee County in said District of Arizona";

4. Omit sub-paragraphs (d) and (e);

5. Include sub-paragraph (f);

6. Omit remainder of paragraph 4 down to and including the word "Arizona", in line 2, page 17;

(g) Include paragraphs 5, 6, 7, 8, 9, 10 and 11 in full, and paragraph 12 down to and including the fourth line on page 25, omitting the tables on pages 25, 26 and 27, and the first three lines on page 28, and insert, beginning with "Total 27,000 acres", on page 26, and all the remainder of paragraph 12, on page 28;

(h) Include paragraphs 13, 14 and 15 in full;

(i) Include the prayer in full.

14. Include that part of admissions of service of amended complaint dated December 5, 1927, beginning with line 4, page 7, to the end thereof on page 9.

15. The following parts of "Answer to Amended Bill of Complaint" of Franklin Irrigation District et al, filed January 8, 1929;

(a) Omit caption;

(b) Include on page 1 the words "Come now", and omit balance of pages 1, 2, 3, 4, and the first five lines on page 5;

(c) Beginning with "Group V", line 7, page 5, include sub-paragraphs 1 and 2, omit sub-paragraphs 3 and 4, include sub-paragraph 5, omit sub-paragraph 6;

(d) Include, beginning with the words "And [647] answering", line 15, page 6, to and including paragraphs I, II and the first section of paragraph III, ending with the words "General of plaintiff", line 4, page 7;

(e) Include paragraph IV, beginning with line 16, page 7, down to and including the word "Hidalgo", line 4, page 8, and omit beginning with line 5, on page 8, down to and including line 17, page 31; include paragraph XV, beginning with line 18 to and including line 29, page 31; omit all thereafter down to and including the words "and irrigated thereby", line 22, page 134;

(f) Include all of sub-paragraph 5 of paragraph XX, beginning with line 23, page 134, to-wit, "5. As to defendant Sunset Ditch Company", down to sub-paragraph 6, on page 146, line 27, omitting therefrom the tables or schedules beginning on line 26, page 141, to and including the words "Total acres 4.5," line 25, page 145; omit all thereafter down to and including line 17, page 168;

(g) Include the prayer in full, beginning on line 19, page 168, to the end.

16. Include condensed statement of Reporter's transcript of testimony and proceedings, before

Honorable Albert M. Sames, Judge, taken at Tucson, Arizona, on November 6, 7 and 9, 1939, filed April 9th, 1940.

17. Include the U. S. Marshal of New Mexico's Return of service of order to show cause upon Parley P. Jones, et al, directors and officers of Sunset Canal Company.

18. Include condensed statement of Reporter's transcript of testimony and proceedings, before Honorable Albert M. Sames, Judge, taken at Tucson, Arizona, on the 11th day of March, 1940, filed April 9th, 1940.

19. Include decree as per stipulation.

20. Include copies of reports of Courts Water [648] Commissioner, as per stipulation.

21. Include Petitioners Exhibit "A" in evidence.

22. Include the Notice of Appeal with date of filing.

23. Include Order fixing Amount of Supersedeas Bond.

24. Note the filing of supersedeas bond, but do not set out bond in full.

25. Include this statement of points to be relied upon by appellants, together with designation of parts of record.

26. Include the designation by appellee of parts of record to be included.

A. T. HANNETT

M. C. MECHEM

Attorneys for Appellants

Received copy this 9th day of April, 1940.

H. S. McCLUSKEY

JOHN C. GUNG'L

H. S. M.

Attorneys for Appellees

[Endorsed]: Filed Apr. 9, 1940. [649]

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[Title of District Court and Cause.]

CONDENSED STATEMENT OF REPORTER'S  
TRANSCRIPT OF TESTIMONY AND PRO-  
CEEDINGS BEFORE HONORABLE AL-  
BERT M. SAMES, JUDGE, TUCSON, ARI-  
ZONA, NOVEMBER 6, 7, AND 9, 1940  
(RULE 75-b)

The Court: Are you ready, gentlemen?

Mr. Flynn: The Government is ready, your Honor.

Gov. Hannett: The defendants are ready.

Gov. Hannett: Now, at this time, if the Court please, we have a further proposition that we desire to submit to the Court, on a question of law that we think is of primary importance. If the Court please, the record in this case shows definitely that this decree is a consent decree; there can be no question about that, and I think counsel will concede that that is true. The language of the decree itself is very plain in that respect. We desire to call the Court's attention to the following line of

authorities, (presenting authorities and argument).

And so, if the Court please, we now say that the United States of America, having sought the aid of this Court to enforce the decree, which is in the nature of a contract and which is a consent decree, are now confronted with showing that this decree is applicable [650] and this proposition is brought to your Honor's attention at this time for the purpose of determining who shall go forward with this controversy at this time, it being our position, which we respectfully submit to your Honor, that the burden of going forward is with the United States District Attorney.

Mr. Flynn: The assumption of counsel that this decree is an equitable one and the burden is upon us to prove it, even assuming that the rest of his argument is correct and his law is sound, of course, is not well founded, because this decree is a decree of this Court and certainly carries the presumption of being equitable at this time and, if in fact it is not equitable, that burden should be upon the respondents in this case. We do not consent that they even have that right to go back of the decree, but even admitting part of counsel's argument, we contend that the burden is upon them to establish their defense. There is a petition here, a verified affidavit, stating facts constituting a contempt of this Court, and the question of whether or not a person can be guilty of contempt of a consent decree until it is established by further proceedings that this is equitable, I don't believe there is any foundation

in law for that position. In fact, a consent decree is really more solemn and more binding upon all parties than a decree entered without their consent, and so we contend that the burden is upon the respondents to purge themselves of the allegations in the petition and supported by the verified affidavit, which, insofar as I am able to determine, with the exception of some of the defendants who have moved away and did not use water in 1939, and died, the burden is upon them at this time. [651] Particularly upon the ones who have appeared here. The pleadings themselves, I think, are sufficient to place the burden upon the respondents in this case to purge themselves of the contempt which is apparent from the pleadings.

The Court: Yes, I think the nature of the proceedings is such on the verified affidavits that have been filed here that it is incumbent upon the respondents here to show cause to purge themselves, if they can, and you may proceed.

Gov. Hannett: We would like the record to show, and of course it does, that the verified petition was met by the verified answer, and we take exception to the ruling of the Court. That being true, I assume it is now incumbent upon us to offer our evidence.

The Court: That is the position of the Court.

(Gertrude E. Mason was then sworn as reporter for the hearing.)

Gov. Hannett: At this time we ask that the Clerk produce the depositions on file here, and that we may read the depositions that were taken.

(The Clerk then produced the depositions.)

Gov. Hannett: May I open them?

The Court: Yes.

Gov. Hannett: These are the depositions of Hon. John E. Miles, Governor of New Mexico, Hon. Thomas M. McClure, State Highway Engineer for New Mexico, Mr. John R. Bradford, Junior, State Policeman for New Mexico, Mr. Washington Hugh Pace and Mr. Cosme R. Garcia.

The Clerk: It will be marked Respondent's Number One for identification. For my record, this is for the case for all the respondents? [652]

Gov. Hannett: Yes.

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Gov. Hannett: If your Honor please, that concludes the deposition. Now, may we call Mr. Bliss?

JOHN H. BLISS,

Called as a witness on behalf of the respondents, being first duly sworn, was examined and testified as follows:

Direct Examination:

By Gov. Hannett:

Q. You may state your name.

A. John H. Bliss.

Q. Where do you reside, Mr. Bliss?

A. Santa Fe, New Mexico.

(Testimony of John H. Bliss.)

Q. Do you hold any official position with the State of [653] New Mexico? A. I do.

Q. You may state that position.

A. I am an engineer in the State Engineer's office, and at present my work is—I am working as an engineer on Interstate Stream work, with the Interstate Stream Commission, part time.

Q. How long have you been in charge of investigation of Interstate rivers for the State of New Mexico?

A. I have been connected with the Interstate Stream Commission ever since it was formed in 1935. I think the month of August of 1935.

Q. Are you a graduate in engineering?

A. Yes, I graduated from Colorado Agricultural College in 1925.

Q. In Engineering?

A. In civil and irrigation engineering, yes, sir.

Q. How many years of practical experience have you had? A. Fourteen.

Q. Have you made any study of the Gila River and Virden Valley of New Mexico?

A. Yes, I have.

The Court: If I understand, counsel wanted to show that any water that came into the Sunset Canal, that conditions and situations were such that that water never reached Coolidge Reservoir and storage dam?

Gov. Hannett: That the water during the growing months, in the growing season of 1938 and 1939,

(Testimony of John H. Bliss.)

that water could have been utilized by the farmers in the Virden Valley and put to beneficial use, in 1938 was denied them and went down the river and was of no use to anybody and disappeared in the sand; that in 1939 the [654] water that was there, when the sovereign power of New Mexico took charge, all of that water, from then up to the present time, if it had been permitted to go down the stream, would have disappeared in the sand and would have been lost forever.

The Court: Does counsel urge that that situation would justify the defendants in not complying with the provisions of the decree?

Gov. Hannett: It would justify the State of New Mexico in going in and exercising its sovereign power. Their officials are charged here with being the agents of these defendants in so going in and exercising that power.

The Court: And the officials of the State of New Mexico are not respondents?

Gov. Hannett: No, your Honor, but this whole case is based on the proposition that they are the agents of these respondents.

Mr. Flynn: That is not so. That is a conclusion of counsel and we disagree with him. There is nothing in the complaint to that effect.

Gov. Hannett: I will see what the complaint says, (reading from complaint to the point ending, "were acting in behalf of the State of New Mexico, who, as your petitioner is informed and believes,

(Testimony of John H. Bliss.)

that all of said acts were performed as agents and representatives of the parties herein complained of." That seems to me very plain, "as the agents of the parties herein complained of".

(After argument)

The Court: Well, the question is back now on the point as to whether it is admissible, that the water flow, if it had not been appropriated, would never reach [655] Coolidge Dam.

Gov. Hannett: That is true, and I would like to read to the Court what Justice Cardozo says, (reading case, following by argument).

The Court: Well, as the Court has indicated, it doesn't see where that water, if it ever reached Coolidge Dam, would ever make any difference as to the appropriation of it under the conditions and in violation of the decree. Well, the objection will be sustained.

Gov. Hannett: At this time, your Honor, we offer to prove that—We take exception to the Court's ruling and we offer to prove at this time by this witness and by the records of the U.S.G.S. and its gauging stations that the year of 1939 was a particularly and unusually dry year, that in the year of 1939 the water diverted by the State Engineer of the State of New Mexico to the Virden Valley farmers, the respondents in this case in the State of New Mexico, which was placed to beneficial use by them, would not and could not have reached

(Testimony of John H. Bliss.)

the dam of the plaintiff at Coolidge; that it would not and could not have benefitted any water users across the State line in the State of Arizona; and further, that by the terms of the decree, had the decree been enforced as interpreted by Mr. Firth, the Water Master and as operated by him in years gone by, and had not the State Engineer of the State of New Mexico taken charge of and administered the waters of the Virden Valley to these defendants, that all vegetation, including alfalfa and fruit trees and all agriculture in this valley would have been destroyed; and further, that we have further witnesses to corroborate and substantiate the testimony of this witness. [656]

The Court: Well, as has been indicated, that might have justified the appropriation by the Virden Valley users of the water and saved it to their use before it reached the canal provided that it was done under the decree, but I don't believe that the justification — as the Court indicated — for taking water as they did is sufficient excuse for not complying with the terms of the decree.

Gov. Hannett: There is no proof that they did, and it is not asserted that they did, your Honor, but that the officers of the State of New Mexico did, as agents for these defendants, and the testimony of the officers of the State of New Mexico is before the Court.

The Court: Well, the Court has made its ruling, and you have saved your exception. Have you com-

(Testimony of John H. Bliss.)

pleted the tender of the proof that you wanted to offer?

Gov. Hannett: Yes, your Honor.

The Court: Very well.

Gov. Hannett: Mr. Bliss, will you take the chair over there a minute? (The witness complied). Now, if the Court please, perhaps we can save time by making a tender. I propose and offer to show further by this witness that taking the lands only of the people who are now before the Court in this proceedings here, and in response to this order, only the people who are here respondents, taking their land alone and their water alone, that it would be physically impossible to administer the waters of the Sunset canal to the users of decreed rights only; that is to say, the record shows and we offer to prove that more than substantially half of these defendants are either dead or have sold or leased and did not use water in 1939, and that it would be physically [657] impossible for water from this one canal to be administered to the people who are here, bound by this decree, and leave out the people who have died or sold and who are innocent third purchasers.

The Court: Well, that matter was presented, I think, during the testimony yesterday, or referred to, the matter you are alluding to now?

Gov. Hannett: Yes, your Honor.

The Court: And you want now to proffer such testimony through this witness?

(Testimony of John H. Bliss.)

Mr. Flynn: We object, of course, your Honor, on the ground that it is immaterial and no defense, and does not tend to prove any defense.

Gov. Hannett: In order to make the record perfectly clear, we now offer to prove by this and other witnesses that over half of the lands in the Virden Valley which were originally under the decree of this Court in this case has passed into the hands of innocent third purchasers and to people who are not now and never have been parties or privy to this decree, and that such lands are all served by one canal, that is to say, the lands under the decree and owned by people here present and the lands no longer under the decree or subject to the jurisdiction of this Court, and that when Mr. Firth shut off the headgate in October of 1938, and posted his notices on the 3rd of January, 1939, that no water would be delivered until it had been paid for, that he shut off not only the water of the people under this decree but of necessity, by reason of the physical facts, he shut off water from people owning substantially half of the land, who are not under this decree or bound by it, directly or indirectly, who are innocent third purchasers, and who had a right to [658] the waters under the laws and the statutes of the State of New Mexico and the laws of the United States.

The Court: And the parties you are referring to are parties claiming rights under the Sunset Ditch or Sunset Canal?

(Testimony of John H. Bliss.)

Gov. Hannett: There is no Sunset Ditch or canal, your Honor—

The Court: Well, what is so-called.

Gov. Hannett: The rights are claimed only by the individuals. The Court will readily perceive, from the articles of incorporation introduced here, that it was the Sunset Ditch Company, and that corporation never had any existence at the time this suit was instituted, and further, by the articles herein evidence, it was simply a common carrier and never had any right to appropriate water and never has appropriated water. There are two defendants in here, the Sunset Ditch and the Sunset canal, and the Sunset canal never existed; the Sunset Ditch Company is dead, and the Sunset Ditch Company never had the authority to appropriate water, never attempted to and never did appropriate water.

The Court: Well, your tender is completed, Governor Hannett, the testimony you propose to offer?

Gov. Hannett: Yes, your Honor.

The Court: The ruling will be adhered to.

Gov. Hannett: Exception?

The Court: Yes.

Gov. Hannett: That is all, Mr. Bliss.

(Witness excused)

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Gov. Hannett: We also offer to prove by Mr. Firth, the Court's Water Commissioner, the physi-

cal facts just offered to be proved by this witness. [659]

The Court: Of course, the same ruling of the Court would apply to the same testimony or approximately the same testimony.

Gov. Hannett: I think perhaps we can agree as to the way the record should be made up, and I will dictate this for the purpose of the record, and if we [660] don't agree, of course, we can wait for Mr. Smith to come and present his testimony.

These respondents offer to show by the testimony of Mr. Smith, the Assistant State Engineer, who has joint custody of the records of the State Engineer's office of the State of New Mexico, wherein all water rights, that is to say, the right to appropriate waters of the public streams of New Mexico, including the Gila Valley or the Gila River, and the right to divert waters from the said stream are filed, and that there is no corporation in New Mexico, domestic or foreign, or any corporation who has ever appropriated or attempted to appropriated or filed any papers of any class or character indicating a desire to appropriate waters from the Gila River in Hidalgo County, New Mexico, with the State Engineer's office at Santa Fe; and further, that it appears affirmatively from the records of the State Engineer's office at Santa Fe that the rights of these respondents in this proceedings were, the water rights, the right to appropriate was acquired directly from the State by filings in the

office of the State Engineer; that the only rights or claims to rights to use water from the Gila River in the Virden district in Hidalgo County, New Mexico, appearing of record are in the names of the individual water users who are named defendants in the original decree and such others who have thereafter made application for water rights.

The Court: That is the purport of the testimony that will be probably proffered on the appearance of the witness to whom you have alluded?

Gov. Hannett: That is correct, your Honor.

The Court: Well, I think the objection is [661] good and I shall so hold.

Mr. Flynn: May the record show that the objection stated prior to the statement by Governor Hannett is sustained?

Gov. Hannett: I think the objection ought to be stated here, so we may know clearly what it is.

The Court: What is it you want?

Gov. Hannett: If your Honor please, I would like to have Mr. Flynn, the representative of the United States, make his objection now.

The Court: I thought he made his objection.

Gov. Hannett: I would like to have it repeated now, because he made some statement about there being no proper foundation, and I would like to know if it is included in this objection, so then we will have to wait for Mr. Smith to come.

Mr. Flynn: We object to the offer, and if the testimony were offered by the witness in Court we would object to it upon the same grounds, that is,

upon the ground that the evidence, the testimony, is immaterial as to the issues in this case and does not tend to disprove the charge or to prove the innocence of the respondents to the offense charged, and for the further reason that it is about a matter which is incorporated in the original pleadings in this case and merged in the decree which was entered upon those pleadings and the stipulation, and therefore it would not be admissible for that reason as well as being immaterial; for the further reason, also, that it is to a large extent conclusions and would necessarily be a conclusion of the witness.

Gov. Hannett: Before the Court rules on that, would you please read my offer? [662]

(The reporter then read the offer of counsel.)

The Court: The nature of the ruling you want at this time is as to whether that testimony would be received?

Gov. Hannett: Yes, your Honor.

The Court: The Court has already indicated what the ruling would be, and I state now that if the objection, if the witness was here, was urged against that testimony, the Court would sustain the objection.

Gov. Hannett: Exception, please.

The Court: Allowed.

## MR. WASHINGTON HUGH PACE,

being first duly sworn, was called as a witness on behalf of respondent, and, being examined by A. T. Hannett, testified as follows:

My name is Washington Hugh Pace. I have lived in the Virden Valley nearly all my life. My people came there when I was two years old. I was gone for approximately six years from 1925 to 1931. I know all the people. I am the same person Mr. McClure testified to as being the water master.

The following respondents did not use any water during the year 1939:

M. M. Allred

George H. Cosper, Jr.

A. C. Cruwell

Mary Jane Jones

Edward Lunt

Nancy O. Pace

H. M. Payne

E. C. Payne

The respondent E. C. Payne had his land leased and the lessee used water thereon during the year 1939. [663]

The following respondents used water distributed to them by the Town Ditch Boss of the Town of Virden, which is an incorporated village under the laws of New Mexico:

Anna H. Lunt

Ralph Richardson

R. Richens

(Testimony of Washington Hugh Pace.)

Nancy A. Smith

E. Thygerson

B. Y. Whipple

School District No. 2, Hidalgo County

The following named respondents used water from the Sunset Ditch for the year 1939:

R. W. Brooks

Carl M. Donaldson

Byron Echols

B. J. Gale

G. Lynn Hatch

Rachel Jensen

Milton N. Jensen

R. T. Johns

Willard E. Jones

John B. Jones

T. V. Jones

Parley P. Jones

P. L. Lunt

Fenley F. Merrill

Orson A. Merrill

Hans Mortensen

Leslie B. Payne

J. E. Payne

Orsen J. Richens

Henry L. Smith

Florence R. Swofford

(Testimony of Washington Hugh Pace.)

J. E. Payne, Trustee for  
the Church of Jesus  
Christ of Latter Day  
Saints

That all of said water was diverted from the Gila River and delivered from the Sunset Canal.

Nancy O. Pace is an invalid, eighty years of age, the owner of land and water rights under the Sunset Ditch, but did not use water. She had leased her land to H. M. Pace who did use water.

Mary Jane Jones did not use water. She lives around with her children, and owns a town lot in Virden. Water was delivered to her lot in town during the summer of 1939.

The Town of Virden has a ditch boss and the water is turned over to him from the canal and he carried it to the sidewalk of the lot owners and turns it into their lots and issues it out that way. Those lots are 1.1 acres in area. [664]

I came to Santa Fe with a committee and appeared before the Interstate Stream Commission on November 22, 1938. On the committee were Robert Mortensen and myself who owned water rights under the Sunset Canal, but we are not parties to this suit.

As water master I estimated the amount of water available for eight days and gave the water ditch rider the figure as to how long he could run this water per acre. The basis for the amount of water

(Testimony of Washington Hugh Pace.)

delivered was the amount of water in the river available. There were under the ditch approximately 2,456 acres of filed water rights. In addition to giving water for the 2400 acres filed, I gave water to the lower end of the Sunset in Arizona for 318 acres, and I delivered water to the Arizona users every time I delivered water to the people in New Mexico under the Sunset Canal. I released water to the Arizona people on request of some official in Arizona. I remember when the Sunset Ditch was closed in the month of October, 1938, and I had a discussion with Mr. Firth about the Sunset Ditch being closed. It was on October 10, 1938. There were present, Parley Jones, Mr. Firth and myself. Jones and myself tried to get Mr. Firth to let us have a few hours to finish up. He closed the gates and locked them and I said, "Firth, who is going to get the benefit," and he said, "Not a soul." I meant that the water would be lost in the river bed and would not reach the Arizona users.

#### Cross Examination

By Mr. Flynn:

When I made the statement that approximately half the land owners are not under the decree, I meant that half the present owners were not parties to the [665] litigation. I do not know whether that is true of the land owners when the decree was entered. I am basing it on present land owners and I took the original ones and figured who had sold

(Testimony of Washington Hugh Pace.)

or died. I do not know anything about the decree except the names of the parties. There are 2,450 acres under the decree. That is what Mr. Firth issued water to.

I started as water master on the 22d day of February, 1939. I received requests from the Sunset Canal Company. The officials were Parley Jones and J. R. Robbe. The individuals who requested water to be turned in who claimed to be acting as officials for the Canal Company were Parley P. Jones under the Sunset and J. R. Robbe. Robbe claimed to represent the Sunset Canal Company. At his request I turned water into the Sunset Ditch. No other individual requested it. I was not connected with any company or canal myself. I made estimates of the amount of apportionment without advice or suggestion of any canal company or owners and took it upon myself to determine how much water they could use and when to use it to properly irrigate their land. I had no complaint from any New Mexico user or company of the amount of water they were getting. At no time has any land owner in New Mexico requested me to permit the water commissioner appointed by the Federal Court to administer the water and take care of it. The water turned into the canals by me was used by New Mexico land owners and users. They never made any objection to my administering or distributing the water.

(Testimony of Washington Hugh Pace.)

Redirect Examination

By Mr. Hannett:

I administered the water under direction of Mr. Firth for the years 1937 and 1938 and was employed [666] by the Sunset Ditch Company. I followed Mr. Firth's orders in the distribution of water. Acting under Mr. McClure I followed the same method and also kept up with the land owners the same as before.

I mean by saying that I kept up with the land owners, I visited the lands not as was done—as I did in 1937 and 1938, but I was right along with the water as it went on the lands in 1939. I measured and helped the ditch rider and took the same amount of water when there was sufficient.

During the time Mr. Firth was administering the water I was paid by the Sunset Canal Company, and the same situation continued under Mr. McClure. They had a ditch rider. I was not employed or compensated by the Sunset Ditch. They had a separate man as ditch rider who helped me.

Recross Examination

By Mr. Flynn:

That was J. R. Robbe and he was paid by the Sunset Canal Company. He was under my orders.

Redirect Examination

By Mr. Hannett:

The State of New Mexico is paying me.

Gov. Hannett: Now comes Parley P. Jones, Hiram Pace, R. W. Brooks and Rachael Jensen, summoned in this case as officers and directors of the Sunset Canal Company, and appearing specially for the purpose of this motion and for no other purpose, move the Court to quash the rule to show cause and the service of such rule upon them as such officers and directors. (1) That they are citizens and residents of the State of New Mexico and that said rule to show cause was served on them in the State of New Mexico and outside of the territorial jurisdiction of this Court. [667]

If the Court please, we believe the motion is well taken and raises the same question as raised in the Pace motion, and for the reasons stated in support of the Pace motion we take the position that this motion is well taken.

Then we have a further motion. I assume that the Court will take this motion under advisement along with the Pace motion?

The Court: Very well.

Gov. Hannett: We have a further motion to present to the Court to dismiss.

Mr. Flynn: Just a moment, may I have the names of those included in this last motion?

Gov. Hannett: Parley P. Jones, Hiram Pace, R. W. Brooks and Rachael Jensen.

Mr. Flynn: For the record and information of the Court on this motion, our records show that R. W. Brooks in behalf of whom the motion is

made, or one of them, was served in Duncan, State of Arizona.

Gov. Hannett: He was served in Duncan on the original order, but, as I understand it, there was a supplementary order served on him as director, September 21st, and it is that supplementary order that was served in the State of New Mexico, and it is only to that service that this motion is directed.

The Court: You may proceed.

Gov. Hannett: Now comes the respondents and defendants herein, by their attorneys, who are owners of land and water rights described in the final decree entered herein on the 29th day of June, 1935, said lands and water rights appurtenant thereto lying entirely within the State of New Mexico, and moves the Court to [668] vacate said decree and all orders pursuant thereto so far as said decree purports to determine the priority of said water rights and regulates and controls the diversion of said water and the use and enjoyment thereof by these defendants in the State of New Mexico, and as grounds for said motion respectfully shows to the Court, 1st, that the Court was without jurisdiction to try and determine the issues in this cause, insofar as they involve the lands and water rights situate in the State of New Mexico, for the reason that this suit was brought solely for the purpose of quieting the title of the United States to said waters and is a naked suit to quiet title; that as such it was a local action and could be main-

tained only in the State of New Mexico in which said lands and water were situated, and therefore said decree was null and void so far as it affects waters of the Gila River in New Mexico and land to which it is appurtenant or to these defendants who were the owners of water rights and lands in New Mexico. Second, that it appears on the face of said decree that this Honorable Court was without jurisdiction to try the title and to determine the right to the use of waters of the Gila River in New Mexico and to regulate and control the use thereof by appropriators, including this defendant, in the State of New Mexico in the absence of the State of New Mexico as a party to said suit, for the reason that the State of New Mexico is an indispensable party to such controversy, without whose presence in said suit this Honorable Court was without jurisdiction to entertain the said suit or make and enforce said decree, for the following reasons: (a) The interest [669] of the State of New Mexico is directly affected by said decree; (b) The adjudication of the rights of the parties before the Court involves the determination of the rights of the State of New Mexico and because of the absence of the State of New Mexico a decree based upon such determination will not be binding on the State and will lack finality; (c) The issues in this case and the decree entered herein directly and necessarily embrace a determination of the rights of the State of New Mexico and the nature and extent thereof and such rights are so inevitably, un-

avoidably and inextricably tied up and related to the rights of the State of New Mexico that the State of New Mexico is an indispensable party and therefore said decree and orders made pursuant thereto are null and void. Third, that it appears from the face of said decree that it purports to bind and affects the title of the heirs, devisees and assigns of the defendants owning the lands and water rights of the Gila River in New Mexico administered under said decree; that the said land lies entirely within the State of New Mexico and without the territorial jurisdiction of this Court and that the said decree and the orders made pursuant thereto are therefore null and void. Four, that the decree on its face purports to operate directly upon the land and water rights therein described lying entirely within the State of New Mexico and without the territorial jurisdiction of this Honorable Court; that said decree and the orders made pursuant thereto are therefore null and void, and for the further reason that the entities attempted to be named as defendants, the Sunset Canal Company and the Sunset [670] Ditch Company, were not in existence at the time of the entry of this decree; that at the time of the entry of this decree there was no such company in existence as the Sunset Canal Company, and that at the time of the entry of this decree the Sunset Ditch Company was legally dead and no longer had corporate existence. That it does not appear in the original complaint or petition in this cause that the United States of

America, the plaintiff herein, was damaged or threatened with damage, nor does the decree find that the plaintiff herein was damaged or threatened with damage or that the respondents herein in the State of New Mexico were committing any wrong or any tort or violating any of the rights of the plaintiff at the time that this decree and injunctive order was originally entered into.

Gov. Mechem: And, if the Court please, further, as this is a suit to quiet title, that it does not appear from either the amended complaint and does not appear from either of the complaints that, or from any order or decree, that at the time this suit was brought, the United States, in its own behalf or in behalf of any one else, was in the present use and enjoyment of the waters title to which they sought to be quieted. That is under the general rule in the United States Courts as to jurisdiction of the Court to quiet title, in that the plaintiff must be in possession in order to maintain suit to quiet title.

Gov. Hannett: Now, in support of our motion to the Court, we desire to present a brief argument and call the Court's attention to certain authorities.

(After argument [671])

Gov. Hannett: We submit, if the Court please, that our motion is well taken.

Mr. Flynn: Does the Court care to hear any argument in regard to this? It is our belief, your Honor, that the questions raised by these motions

were passed upon by your Honor during the trial, to the effect that they are not properly raised on these proceedings, that this is not the proper place or proceedings to attack the judgment of this Court and all the parties interested in the judgment are not in Court under process; in other words, the only parties in Court are the respondents, only a small number, interested in this decree and parties to it, and naturally an attack on this judgment, to vacate it and set it aside, would have to be served on all the interested parties, in order that they may be in Court.

The Court: I think the question of the jurisdiction of the Court in the matter has not been raised to the same extent that it has been here on this motion, and I would like to be advised as to those points that have been raised by the respondents.

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### PARLEY P. JONES,

a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Flynn:

My name is Parley P. Jones, and I am one of the original defendants in this case and have been served with order to show cause in this proceeding. I still own land in the Virden Valley and received water during the year 1939. Also received water under the administration of Mr. Firth as Water

(Testimony of Parley P. Jones.)

Commissioner since 1936 and paid part of the assessments during that time. [672] Assessments were paid to Mr. Firth. They were not paid by a company. They were paid by our community ditch. The source of those funds was common contributions of labor assessments. They were made general assessments for their general expense and took the assessments out of the funds. I received water through the Sunset Ditch. It is not a corporate entity. It is a community ditch. It is operated by joint efforts of the community. We collect labor assessments. Everybody in the community contributes. Mrs. Jensen collects the money. It is operated under the name of Sunset Ditch Company.

"Mr. Flynn: I show you here a certified copy, certified by the State Engineer of the State of New Mexico, purporting to be an application for permission, an application filed in the office of the State Engineer at Santa Fe, New Mexico, and call your attention to the typed words there, 'Certified Copy,' to the name, Sunset Canal Company, Cosper-Windham Canal, by, signed, Parley P. Jones, President.' Did you execute such an instrument on or about the 16th day of April, 1938?"

Witness: "I don't know whether I did or not. I don't recall it."

Mr. Flynn: "Mr. H. Vearle Payne is your counsel in this matter here, is he not, the gentleman in Court here is your attorney?"

(Testimony of Parley P. Jones.)

Witness: He is acting in connection with the State. He is being paid by the State. He did not represent me before the Interstate Stream Commission. I attended the meeting before the Interstate Stream Commission and went for the purpose of getting the Interstate Stream Commission to do something to relieve me from the decree. I do not recall having signed the document above-referred to. [673]

Mr. Flynn: "During the year 1939, when water was being diverted from the Sunset Canal, or ditch as you call it, and taken to the lands in the Virden Valley there, and distributed thereon, that ditch or company or whatever you want to call it operated and was being managed by some members who were selected for that purpose by the other residents there?"

Witness: The ditch was created in the first place and has been managed at all times through the joint efforts of the people who reside in that valley, and the people who reside in the valley select certain representatives to manage and control it.

Mr. Flynn: "Don't the residents in that valley, the land owners and users, select some one to represent them in the control and management of this ditch and everything that had "to be done in connection with the handling of the ditch, don't they select somebody to represent them, as officers or representatives?"

(Testimony of Parley P. Jones.)

Witness: Surely they do. I signed as President of the Ditch Company when signing anything, but I do not recollect signing the document shown to me. It has been my understanding and my knowledge all the way through that it was the Sunset Ditch Company and operated that way. So far as the canal company I don't know about that. The other persons selected to help manage this company were Hiram Pace, R. W. Brooks and there was a secretary—Mrs. Jensen.

Mr. Flynn: "I have asked you some questions and may have asked you this, the date of this instrument, which is the 16th day of April, 1938, and the H. Vearle Payne, the notary public who took this acknowledgment is [674] is the same H. Vearle Payne who is now attorney in the court room here, representing the respondents at this hearing?"

Witness: Yes, the same Mr. Payne that is here. He was not attorney for this company. I do not remember when I became an officer of this company, but we were appointed as a committee in January, 1938. Mr. Fenley Merrill had been president of the company and I took his place. There was a meeting of the land owners and the water users in which this selection occurred. We merely appointed a committee but no one of it was designated as president. They merely selected a committee and then the committee themselves appoints one or chooses one as head of the committee. We

(Testimony of Parley P. Jones.)

have a regular meeting and at it we appoint a committee from the group. The officers are selected by all present at the meeting by vote. I suppose they may be called directors, but I do not recall whether they are referred to as a board of directors. The board itself designates the president and secretary. They vote at the meeting according to acreage. Mr. Merrill had been president prior to my selection for several years. The change was made in 1938. The change was not made to get someone to take more aggressive action in getting relief on this decree. The only changes made in 1938 were the election of myself and Mr. Pace, and when the board that was selected met, I was selected President and Mrs. Jensen Secretary. The Board of the company has been operating under the system above described since the expiration of its charter which was in 1921, and they were operating it in that manner when this suit was filed and during the time of negotiation for settlement and consent decree. [675] It has not been known and operated as the Sunset Canal Company. It is operated under other names including Sunset Ditch. It has not been known as the Sunset Canal Company to my knowledge. However, this document here you show me is written that way, but I have always thought of it as the Sunset Ditch Company. I do not recall having seen the document dated April 6, 1937, you have shown me. In April, 1937, Mr. Fenley F.

(Testimony of Parley P. Jones.)

Merrill was president of the company and Orsen J. Richens was member of the board.

Mr. Flynn: "And would you say now that they weren't at least sometimes known and sometimes operated as the Sunset Canal Company?"

Witness: "Yes, sometimes apparently acted under both, but to my knowledge, I have always thought of that as the Sunset Ditch Company, but they may have operated that way." I may have received a lot of correspondence addressed to the Sunset Canal Company from State Officials of the State of New Mexico and Mr. Firth as Water Commissioner.

Mr. Flynn: "I show you a carbon copy of a letter here, dated April 11, 1939, with the typed name 'Thomas M. McClure, State Engineer,' and ask you if you recall receiving the original of that letter." (Showing letter to witness).

Witness: "Yes, I recall that." It was addressed to me as President of the Sunset Canal Company.

Mr. Flynn: "And then, to refresh your memory, I will show you a carbon copy of a letter, and ask you if all of the mail demands for payments and assessments that you received as an officer of that company from Mr. Firth were not addressed to you as president, either [676] to you as president or to the Sunset Canal Company itself (showing letter to witness)."

Witness: "Well, I couldn't say as to all of them. I suppose they were."

(Testimony of Parley P. Jones.)

After the water was shut off in 1938, Hiram Pace, Hugh Pace, Mr. Fenley Merrill and Mr. Payne and myself as board of directors and officers and representatives of the Sunset Canal Company went down to Safford to see Mr. Firth. Prior to 1939 we paid assessments to Mr. Firth for the water users operating under this decree. After 1939 we continued to use this water from the Gila River. We have not paid any assessments to Mr. Firth or anyone else under that decree for the use of the water, and the company did not make any collection from the water users for that purpose. The water users have not tendered to the company or anyone else money to pay the assessments.

#### Cross Examination

By Mr. Hannett:

No demand has been made personally on any person to pay the 13¢ per acre for 1939. I don't claim to be a director of any corporation, Sunset Canal Company or Sunset Ditch Company. There is no corporation operating a ditch or canal in the Virden Valley on the north side of the river, and I am not a director or officer of any ditch company serving these respondents.

I am 36 years old. I was not an officer or agent or director of the Sunset Ditch Company when it ceased to exist in 1921, or prior to that date. I never employed the Governor of the State of New Mexico, State Engineer or State Police to represent

(Testimony of Parley P. Jones.)

me for any purpose in connection with the waters of the Gila River, and they have not acted as my agents to my knowledge. [677]

#### Redirect Examination

By Mr. Flynn:

Mr. Flynn: "You did go up there, though, and ask them to do something about this situation, didn't you?"

Witness: We called on the State Engineer. There was a demand made upon me as President of the Sunset Canal Company, for the payment of the assessments for the year 1939, and it was left to the Secretary of the company. It was a written demand by Mr. Firth, the Water Commissioner, and stated that the payment due in January, the first of the month, was due and that if it was not paid the water would be shut off, and it wasn't paid and the water was shut off.

The voting representation of the different land owners down there is not evidenced by any certificates or shares of stock. We do not have any books.

Mr. Flynn: "How is the acreage determined? Is there a record of that kept by the company, so they will know how many votes a man is entitled to, how do you determine the number of acres he has?"

Witness: "There is no record of it. I think the secretary has no record of that. We have just merely relied on the honesty of them, to state how

(Testimony of Parley P. Jones.)

many acres they have." I have no books or records of the company here with me.

#### Recross Examination

By Mr. Hannett:

There were originally shares of stock in the Sunset Ditch Company.

#### Redirect Examination

By Mr. Flynn:

I have seen, in an old record we have there, is the reason I say that, I have seen the stubs of the old shares of stock. [678]

#### Recross Examination

By Mr. Payne:

There have been a few certificates of stock issued in the Sunset Ditch Company since 1921. I do not recall the number, as a means of satisfying the Federal Land Bank for a loan on some of that land.

Mr. Payne: "In other words, a man who had an application with the Federal Land Bank, some showing had to be made that he was entitled to water through this canal, is that right?"

Witness: Yes, and stock certificates were issued as the only way we had of showing it and there were some issued that way.

(Testimony of Parley P. Jones.)

Redirect Examination

By Mr. Flynn:

Mr. Flynn: "Did you or this company ever furnish to Mr. Firth or anyone representing this Court under this decree any reports of the amount of water diverted and used during the year 1939?"

Witness: "No, sir, not that I know of."

Recross Examination

By Mr. Hannett:

I did not individually divert any water during the year 1939, nor did any respondent divert any water during the year 1939.

Mr. Hannett: The only point of diversion was the Sunset Canal Company, wasn't it—The Sunset Ditch Company?

Witness: Yes, sir.

Mr. Hannett: "Who did the diverting there?"

Witness: The State of New Mexico, its officers.

Redirect Examination

By Mr. Flynn:

Mr. Flynn: "Through these devices that were put in there through Mr. Firth or under his direction or under this decree?" [679]

Witness: They have since been changed, they are not there now. The State of New Mexico owns their own devices. The ones in there when the State Officials took it over were installed under this

(Testimony of Parley P. Jones.)

decree, but since then have been changed, and the only means of diverting water out of this stream is out of this canal in order to get it to land owners.

Petitioners "Exhibit A" for identification was admitted in evidence as "Petitioner's Exhibit A" in evidence, and reads as follows: ("Insert Petitioner's "Exhibit A" in evidence").

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Mr. Flynn: At this time, if the Court please, we would like to offer in evidence in this case the original pleadings, the complaint and amended complaint and answer filed in the original suit in this case.

Gov. Hannett: I assume that they are part of the record, but we have no objection.

Mr. Flynn: There may be some question some time arise as to why they were not introduced, and therefore I offer them. The original complaint filed in the Gila River suit.

Mr. Flynn: There was an amended complaint, the original complaint, the amended complaint and the answers thereto filed by the different companies and water users, and for the same reason the decree in this case is offered and also the annual reports of the Water Commissioner for the years 1936, 1937 and 1938.

Gov. Hannett: They are objected to, if the Court please, as being incompetent, irrelevant and immaterial, no foundation laid and no opportunity of

cross-examining the person making the report, and as throwing no light on the issues before the Court here. [680]

The Court: Your objection only goes to the reports?

Gov. Hannett: To the reports only.

The Court: Well, as far as the Water Commissioner's reports, it does not occur to the Court now, the materiality of these reports, and if that is the case, they will be ignored and no foundation has been raised to their introduction.

Mr. Flynn: It is part of the official records of this Court, and if they are admissible no foundation is necessary.

Gov. Hannett: We don't know what is in them, what sort of conclusions drawn or damaging statements.

Mr. Flynn: One of the purposes is to show the operation of this decree under this Court and under the Water Commissioner, and the fact that it was administered to these respondents during the years 1936, 1937 and 1938. And then we expect to offer the reports for the year 1939, for the same reason, to show that there has been nothing done.

The Court: Bearing on what?

Mr. Flynn: Bearing on the administration of the decree in relation to these respondents.

Gov. Hannett: And we interpose the further objection that Mr. Firth is in the court room and we have no opportunity to cross-examine him on that.

The Court: Well, there is a ruling to be made on your objection and I overrule it at this time, Mr. Hannett, but as to the further reports, they are not before the Court yet.

Mr. Flynn: The reports filed for the year 1939 are offered for the same reason, the same purpose.

[681]

Gov. Hannett: Same objection.

The Court: Very well, the same ruling.

Gov. Hannett: Exception.

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Whereupon,

C. A. FIRTH,

a witness called on behalf of the respondents, being first duly sworn, testified as follows:

Examination

By Mr. Hannett:

I am the Water Commissioner appointed by the court in this case and have been operating under this decree in Hidalgo County up until January 4, 1939. I locked the headgates to the Sunset Canal January 4, 1939, and when the headgate was locked it shut off all water of all the users on that canal. I made a demand on the canal company and the Board of Directors individually and Mr. Jones to pay the assessment of thirteen cents per acre, but I did not make a demand on the individual respondents to pay the assessment.

Gov. Hannett: We Rest, and at this time we desire to make a further motion.

The Court: Proceed.

Gov. Hannet: At this time we move the Court to dismiss the petition and the rule to show cause for all the reasons stated in our motion at the close of our evidence in support of our return to the rule to show cause and for the further reason, now that all the evidence on both sides is before the Court, that there is no evidence proving or tending to prove that any one of these defendants disobeyed any order or decree of this Court; and for the further reason that the order of this Court on which the rule to show cause was issued is in express terms an order to this effect, that the Water Commissioner, Mr. Firth, in [682] event of the failure to pay the thirteen cents an acre, shall turn off the water, and there is not a thing in the order complained of which has been violated by these defendants or any of them, either individually or collectively; and for the further reason that neither the original complaint nor the original decree alleges that any act or conduct on the part of these Respondents, prior to the entering of the original decree or the filing of the original and amended complaint, charges these Respondents or any of them with any wrong-doing or with the commission of any tort or any wrong as a basis for the original jurisdiction of this Court; and for the further reason that it does not appear in the petition on which the rule to show cause and the order was issued,

that it does not appear that the United States was damaged, and this being a civil contempt, the only punishment that could be meted out to these defendants is in the nature of a fine compensatory in its nature to compensate the United States, the plaintiff in this case, for damages sustained by reason of the violation. There is no evidence proving or tending to prove that either the United States or any one else has been damaged. [683]

State of Arizona,

County of Pima—ss.

I, Gertrude E. Mason, do hereby certify that as assistant to the official court reporter in and for the Federal Court at Tucson, Arizona, I was called and sworn to act as reporter for the hearing in the within matter; that I was present at said hearing and took down in shorthand the evidence adduced and the proceedings had, and later transcribed my shorthand notes into typewriting, the foregoing on one hundred forty-one pages, being a full, true and correct transcript thereof, with the exception of certain parts of prolonged argument by counsel.

Witness my hand this 15th day of November, 1939.

(Signed) GERTRUDE E. MASON  
Assistant Court Reporter [684]

DEPOSITION OF HON. JOHN E. MILES,  
GOVERNOR OF THE STATE OF NEW  
MEXICO:

HON. JOHN E. MILES,

having been first duly sworn according to law, was called as a witness on behalf of the Respondent, and being examined by the Hon. A. T. Hannett, testified as follows:

Direct Examination

Q. You may state your name.

A. John E. Miles.

Q. Do you hold any official position?

A. Yes, sir.

Q. What position?

A. Governor of the State of New Mexico.

Q. When were you inducted into the office of Governor of the State of New Mexico?

A. January 2nd, I believe.

Q. 1939? A. Yes, sir.

Q. Were you Governor of the State of New Mexico, duly sworn, qualified and acting as such, from and after that date and up to the present time?

A. Yes, sir.

Q. I will ask you to look at this document, which is entitled "Minutes of the Meeting of the Interstate Stream Commission", dated December 21, 1938, and state whether or not you ever saw those minutes before. A. Yes, sir.

Q. State whether or not they were presented to you by Thomas M. McClure, State Engineer and

(Deposition of John E. Miles.)

Ex-officio Secretary of the Interstate Streams Commission, on the 3rd day of January, 1939? [685]

A. Yes, sir, they were.

Q. State whether or not you read and considered those minutes. A. I did.

Q. Did you thereupon take any action?

A. Yes, sir.

By Mr. Hannett: We offer in evidence a copy of the minutes of the meeting of the Interstate Streams Commission, dated December 21, 1938, and ask that it be marked for purposes of identification as "Respondents' Exhibit No. 1." (Instrument is so marked).

By Mr. Flynn: We reserve the right to object to the materiality of the instrument at the time of the hearing. No objection because of the fact it is a copy.

Q. I will ask you to look at this paper, dated January 3, 1939, marked for purposes of identification "Respondents' Exhibit No. 2", addressed by you as Governor of the State of New Mexico to the Chief of the State Police, Santa Fe, New Mexico, and state whether or not, in response to the resolution of the Interstate Streams Commission, heretofore introduced as Exhibit No. 1 by the Respondents, you took official action, and this letter, marked "Respondents' Exhibit No. 2" was that official action?

A. I did take action, and this is a copy of the letter I wrote.

(Deposition of John E. Miles.)

By Mr. Hannett: We offer in evidence Respondents' Exhibit No. 2. We can have the State Police produce the original if you so desire.

By Mr. Flynn: We will not require the original, but reserve the same right to object to the materiality. [686]

By Mr. Hannett: You may take the witness.

### Cross Examination

By Mr. Flynn:

Q. Governor, referring to Respondents' Exhibit No. 1, was that the first information you had received in regard to difficulty down in the Gila River district in regard to the water situation, by New Mexico owners?

A. I think it is, except I may have heard in a general way something about it. But that is the first information that was brought to my attention.

Q. Your action was based then solely upon the action of the Interstate Streams Commission?

A. Yes, sir.

Q. Had you, at any time prior to the receipt of this document, had any conversation with any of the land owners under the Gila River Project with reference to their troubles and their water difficulties under this decree?

A. I don't believe I had, unless they may have mentioned it to me when I was down there, but I knew nothing about it and didn't take much notice. It had never been brought to my attention before.

(Deposition of John E. Miles.)

Q. Prior to the time you received this document, Respondents' Exhibit No. 1, had any land owner in New Mexico, or land owner respondent in this case, come to your office, or come to Santa Fe to see you in reference to their water difficulty?

A. I don't recall anybody ever coming and talking to me about it. As I say, it may have been mentioned to me by some land owner, but nothing was ever brought up to me that would give me any information relative to the matter.

Q. Now, Respondents' Exhibit No. 2 is a letter written [687] by you to the Chief of the State Police, in which you give certain instructions as to what should be done. Prior to writing that letter had anyone else urged this particular action which you suggest in this letter?

A. No, sir, no one had urged it.

Q. Had anyone requested, in addition to the Commission—the Interstate Streams Commission—had anyone else suggested this action be taken by you?      A. No, sir.

Witness dismissed.

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THOMAS M. McCLURE,

having been first duly sworn, according to law, was called on behalf of respondents. Being examined by A. T. Hannett, he testified as follows:

My name is Thomas M. McClure. I am State

(Testimony of Thomas M. McClure.)

Engineer of the State of New Mexico and member and Ex-officio Secretary of the Interstate Stream Commission, and I was holding those positions in January, 1939, and throughout the year of 1938. I have custody of the official records of water rights in New Mexico and I administered those rights as State Engineer under the Constitution and laws of this State. I have custody of the minutes and records of the Interstate Stream Commission as Secretary.

(Witness produced letter of November 25, 1938, respondents' Exhibit 3, identified the same as being a true and correct copy of the original, which was then offered in evidence and is attached to witness' deposition as respondents' Exhibit 3.) [688]

(Witness identified copy of resolution passed by Interstate Stream Commission of State of New Mexico, and stated that it was a true and correct copy of the same under date of December 21, 1938, and the same was presented and introduced in evidence as Respondents' Exhibit 4, which is attached to witness' deposition.)

I delivered respondents' Exhibit No. 4 to the Governor on the 3d day of January, 1939, and thereafter the Governor issued an order to the Chief of New Mexico State Police. (Witness identified said order as respondents' Exhibit No. 2) I presented the said order to the Chief of State Police and thereafter the Chief of Police, by letter, instructed State Policeman John Bradford, Jr. of Lordsburg,

(Testimony of Thomas M. McClure.)

New Mexico, ordering him to carry out the instructions of the Governor.

Bradford and I met Mr. C. A. Firth, Federal Court Water Commissioner and his attorney, John Gung'l at Virden, New Mexico. I showed them the order of the Governor to the Chief of Police and requested the said Water Commissioner and his attorney to deliver to witness the keys of all headgates in New Mexico and gauging stations on the Gila River or to remove the locks and chains themselves and turn over the headgates and gauging stations to me, and I also requested them to cease all administrative functions in New Mexico, to which Mr. Gung'l replied that they would refuse the first request and would consent to the second request under protest. I then informed them that it would be necessary to cut the locks off the headgates and gauging stations and that I was placing a water master in charge of the waters of the Gila River in New Mexico.

Previous to that time I had appointed a water [689] master and this is a copy of order creating a water district (which copy was introduced as respondents' Exhibit No. 5 and is attached to witness' deposition). I appointed C. B. Tooley as water master who served until the 21st day of February, when Hugh Pace was appointed water master, and has continued to serve until the present time. I identify respondents' Exhibit 8 as a true and correct copy of the order appointing the said Hugh Pace as water master of the Lower Gila District.

(Testimony of Thomas M. McClure.)

I mailed a letter to the Honorable Albert M. Sames, Judge of the United States District Court for the District of Arizona under date of December 28, 1938, and a letter to C. A. Firth and to State Water Commissioner, Phoenix, Arizona, under the same date. (True and correct copies of these letters were produced by the witness and were introduced in evidence as Respondents' Exhibits 12, 13 and 14 respectively, and are attached to his deposition).

### Cross Examination

By Mr. Flynn:

I was present at the meeting of the Interstate Stream Commission referred to in Respondents' Exhibit 3, and there appeared at said meeting Mr. H. Vearle Payne, Henry L. Smith, Hugh Pace, Parley P. Jones and Robert Mortensen.

(Mr. Flynn, attorney for the plaintiff and petitioner, then offered Respondents' Exhibit 3 in evidence to be marked "Petitioner's Exhibit 1.")

It was the first time formal complaint had been made to the Interstate Stream Commission. The date of the meeting was November 22, 1938.

I have studied reports submitted to my office by the water master and knew of the action of the United [690] States District Court for the District of Arizona, regarding the Gila River, and I had in my possession a copy of said decree. After the meeting of November 22, I reviewed Federal Court Water Master's reports and compared diversions

(Testimony of Thomas M. McClure.)

exercised under New Mexico rights to see what effect it was having, and it showed a very decided decrease in water needed by New Mexico users. I made a complete study of the diversions which had been made under the decree and compared it with diversions made before that time. My official action on December 31, 1938, in creating the District was the result of my investigation and was an official act to take over the administration of the waters of New Mexico under rightful authority and was for the purpose of protecting the rights of the water users in the State of New Mexico. The Interstate Stream Commission and I took action on New Mexico rights as filed in State Engineer's office. The effect of action of the Interstate Stream Commission and the State Engineer was to supply New Mexico with water it had not been getting under New Mexico rights from the Gila River, and we did not take into consideration in any manner the rights of appropriators in Arizona, and it was our determination that there were no prior rights in any waters of the Gila River insofar as Arizona land owners are concerned in relation to the rights of the State of New Mexico.

I knew of the decree and its provisions for the administration and distribution of the waters of the Gila River in the State of New Mexico through the headgates and that New Mexico land owners had appeared in that litigation. We did not recognize any priorities in Arizona. In determining what the

(Testimony of Thomas M. McClure.)

New Mexico land owners [691] required for irrigation I took into consideration appropriations made and if water was available over New Mexico users it was delivered to Arizona. We are not basing the land owners' right to use water under the decree but on an adequate water supply—whatever they needed, and I knew that New Mexico land owners had appeared in that litigation. I knew that the decree purported to adjudicate rights in New Mexico, but under legal advice we assumed they had no jurisdiction and I gave it no consideration, and that was the advice of the attorney for the Interstate Stream Commission, Mr. Hannett. Prior to January 4th, 1939, I do not think I notified or discussed with any land owners or officers of a canal or ditch company what action I was going to take. I discussed it with Payne and McHaffey when I issued the letter of December 28th to the court.

After I took charge of the control and distribution of waters in New Mexico, the basis of distribution was adequate water supply and I determined that by the needs. I arrived at that by general study of the needs of the growing season. I had no way of determining whether requests were made by the land owners or officers of the company, and made no provision for any written request by land owners in New Mexico. I instructed the water master to distribute the water as needed and as economical as possible.

(Testimony of Thomas M. McClure.)

I had no objections or complaints from New Mexico land owners and heard of none being made the Interstate Stream Commission. There were no requests made upon me by New Mexico land owners or water users or canal companies that the Water Commissioner appointed by the District Court of Arizona be permitted to distribute [692] the waters in accordance with the decree of the District Court of Arizona.

Mr. Payne and Mr. McHaffey are attorneys. They did not state they were acting for any land owners or canal companies.

#### Redirect Examination

By Mr. Hannett:

Neither the State of Arizona, nor any citizen of Arizona, nor corporate entity of Arizona, nor the United States of America has ever filed in my office any appropriation of the waters of the Gila River in the State of New Mexico. Water was not delivered to anyone by the water master appointed by me who did not have a water right filed in the State Engineer's office. I have had a number of conversations with Payne and McHaffey dealing with the Virden area and they have been in regard to general construction problems, ditches, dams, but the first I had in relation to this matter was on November 22.

The owners or the users of water on approximately half of the acreage described in the complaint and described in the decree and who used

(Testimony of Thomas M. McClure.)

water for the year 1939 are not parties to this suit.

When Mr. Firth locked the gates he deprived not only the people who are parties defendant who are water users of the Gila, but also deprived those—approximately fifty per cent—who are not parties defendant.

Mr. Payne may have appeared before me in August, 1938.

I meant that half of the present owners of the acreage were not parties defendant under the decree at the time of the entering of the decree in 1935. We have checked the decreed rights under the decree against the defendants named in the complaint. No water users that [693] I know of made any complaint to me or to the Interstate Stream Commission about the administration of the decree. There might have been some, I am not sure. I believe that the owners in Arizona and in New Mexico are both entitled to an equitable apportionment of the waters of the Gila River, and since I have been administering the waters I believe the Arizona rights have been fulfilled when they requested it under our administration, but I did not take into consideration the rights or priorities of Arizona water users, but only the fact that there was water available when New Mexico land owners wanted it.

I attempted to make an equitable distribution of the waters between the State of Arizona and the State of New Mexico at all times.

**JOHN R. BRADFORD, JR.,**

being first duly sworn, according to law, called as a witness on behalf of the respondents, being examined by A. T. Hannett, testified as follows:

My name is John R. Bradford, Jr. I am an employee of the State of New Mexico as member of the State Police. On January 4, I received a written communication from the Chief of Police and the Governor of the State of New Mexico. They were delivered to me by Mr. McClure. I identify Respondents' Exhibit 2 as a copy of that order.

After receiving the order, Mr. McClure and I went to the Virden District where I saw water commissioner, Mr. Firth, and his attorney, Mr. Gung'l. Mr. McClure requested Mr. Firth that this situation be turned over to him. Whereupon Firth said he could not do that. Then I cut the locks off the gates and opened the headgates. [694]

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**MR. COSME R. GARCIA,**

having been first duly sworn according to law, was called as a witness on behalf of the Respondents, and being examined by Hon. A. T. Hannett, testified as follows:

**Direct Examination**

- Q. You may state your name.
- A. Cosme R. Garcia.
- Q. Do you hold any official position with the

(Testimony of Mr. Cosme R. Garcia.)

State Corporation Commission for the State of New Mexico? A. Yes, sir.

Q. What position?

A. I am Chief Clerk of the Corporation Commission.

Q. As such, do you have the care and custody of the records of the Corporation Commission?

A. Yes, sir.

Q. Does that include all corporations that have been incorporated from the time that New Mexico was formed as a territory, down through statehood, to the present time? A. Yes, sir.

Q. State whether or not a corporation by the name of Sunset Canal Company has ever been incorporated under the laws of the State of New Mexico?

A. I have made diligent search of the records, and have not been able to find any record of it.

Q. Has there been a corporation formed by the name of Sunset Ditch Company?

A. Yes, our records so show.

Q. What does the record show as to the present existence of the Sunset Ditch Company?

A. It shows it was dissolved in the year 1921, June 14th.

Q. Will you read exactly, from your records, the words the [695] record discloses?

A. The index card shows the name, "The Sunset Ditch Company Charter dissolved as per Chap. 185, Laws 1921, June 14, 1921."

(Testimony of Mr. Cosme R. Garcia.)

Q. What do the numerals over here mean?

A. That is Vol. 5, page 231, record No. 3343.

Q. Do you have the Articles of Incorporation of The Sunset Ditch Company?

A. We have them.

Q. Is that part of the official file?

A. Yes, sir.

By Mr. Hannett: We will ask the stenographer to make a copy of that. We offer in evidence the copy of the Articles of Incorporation of The Sunset Ditch Company. (Marked Respondents' Exhibit No. 17).

By Mr. Flynn: No cross-examination.

Witness dismissed.

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RESPONDENTS' EXHIBIT No. 1  
MINUTES OF THE MEETING OF THE IN-  
TERSTATE STREAM COMMISSION  
DECEMBER 21, 1938

The Interstate Stream Commission met in the office of the State Engineer at 10:00 A. M., December 21, 1938.

All members of the Commission were present, and also Gov. A. T. Hannett, Attorney for the Commission.

The Minutes of the preceding meeting were read and approved.

The Gila River problem was brought up and after considerable discussion the following resolution was made:

“Whereas, it has been brought to the attention of the Interstate Stream Commission [696] that in the United States District Court for the District of Arizona in the case of United States v. Gila Valley Irrigation District, et al., entered June 29, 1935, a commissioner or water master has been appointed who is administering the waters of the Gila River outside the jurisdiction of said court and within the boundaries of the State of New Mexico, and

“Whereas, it further appears that the Constitution of the State of New Mexico, by the terms of Section 2, Article 16, provides:

“‘The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.’

“And it further appearing that neither the United States of America, the State of Arizona, nor any qualified citizen or body corporate of the State of Arizona, nor any of its residents, nor any officers or agents of the United States, have ever filed with the State Engineer of the State of New Mexico any application for, or made appropriation of, the waters of the Gila

River or any of its tributaries as required by the statutes of the State of New Mexico, and

“Whereas, it appears that the State [697] of New Mexico was not a party to the litigation and could not be made a party to said litigation wherein said water master was appointed, and it further appearing that said water master is acting, so far as he controls water and performs acts within the State of New Mexico, without lawful authority as against the State of New Mexico, and is interfering with the State’s sovereignty of its waters within said State, said Gila River being a perennial stream and having a large number of irrigators who have appropriations under the laws of the State of New Mexico, and

“Whereas, the interference of said water master so appointed as aforesaid is an invasion of the sovereignty of the State of New Mexico and against the peace and dignity of the State of New Mexico,”

Mr. Chavez offered the following resolution and moved its adoption:

“Now, Therefore, Be It Resolved, that the State Engineer of the State of New Mexico be, and he hereby is, empowered and directed to communicate with the said Commissioner or water master so appointed as aforesaid and advise him to cease interference or exercising any jurisdiction or performing any act touch-

ing the use and distribution of the waters of the Gila River within the boundaries of the State of New Mexico, and that upon the refusal of said water master [698] or commissioner to comply with such orders on the part of the State Engineer, the State Engineer is authorized to present this resolution to the Governor of the State of New Mexico, requesting that he exercise his authority as Chief Executive of the State to direct that such measures be taken by the proper officers of the State to enforce this resolution, and the orders of the State Engineer, and

“Be It Further Resolved, that a copy of this resolution be sent to the United States District Court for the District of Arizona and to the State Engineer of the State of Arizona.”

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PETITIONER’S EXHIBIT No. 1.

“MINUTES OF MEETING OF THE INTER-  
STATE STREAM COMMISSION

November 22, 1938

The Interstate Stream Commission met in the office of the State Engineer at 2 P. M., November 22, 1938.

There were present George Keith and Thomas M. McClure, Chairman David Chavez, Jr., being absent. A. T. Hannett, Special Assistant Attorney General and Attorney for the Commission, was also present.

The meeting was called to order by George Keith.

This meeting was called for a hearing of the Lower Gila River Water Users, who were represented by the following gentlemen:

H. Vearle Payne

Henry L. Smith

Hugh Pace

Parley P. Jones

Robert Mortensen [699]

Their problem was presented by Mr. Payne, in which he prayed relief from the present administered Federal Court Decree under the Arizona Federal Court Globe No. 59 Cause. This Decree, since placed in administration in 1936, has deprived the New Mexico water users in the Virden area of their water rights to such an extent that it is becoming impossible to carry on a livelihood by agricultural means.

After hearing a full explanation by Mr. Payne, the Commission decided to make the necessary investigation of all engineering and legal factors to determine the course to pursue in order to remedy this condition.

Mr. McClure, State Engineer, was authorized to make the necessary engineering investigation and Governor Hannett was directed to review the Federal Court case and submit an opinion on the legal procedure to be undertaken by the Commission to remedy the condition—the expenses of the above to be borne by the Interstate Stream Commission.

The Commission authorized the attendance of Governor Hannett and Mr. McClure to the Colorado River Seven States Committee meeting in Phoenix, Arizona, December 14, 1938."

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## RESPONDENTS' EXHIBIT No. 2

State of New Mexico  
Executive Department

EB

John E. Miles  
Governor

Guy Shepard  
Secretary

Santa Fe

January 3, 1939

To The Chief of the State Police  
Santa Fe, New Mexico

Dear Sir:

Pursuant to a resolution heretofore passed by [700] the Interstate Stream Commission, the State Engineer, Mr. Thomas M. McClure, was instructed to take jurisdiction over the administration of the waters of the Gila River, an interstate stream, and it appearing from said resolution and the records of the said Commission and the State Engineer's office and from other evidence placed before me, that a certain C. A. Firth, and assistants acting under his direction, have assumed unlawful jurisdiction over said stream and are attempting to administer the same without authority and are invading the sovereign proprietary interests in the waters of said stream of the State of New Mexico, and it

further appearing that although requested by the State Engineer, Mr. Thomas M. McClure, to desist from interfering with the waters of said stream and attempting to administer the same, that the said C. A. Firth and his said assistants continue to unlawfully interfere with the State's sovereignty in the waters of said River.

You will therefore under the direction of Mr. Thomas M. McClure, State Engineer, cause the said C. A. Firth and his assistants to desist from in any manner attempting to interfere with the waters of said stream or to administer the same, and you will also put said Thomas M. McClure, State Engineer of the State of New Mexico, in full possession of the facilities for administering the waters of said stream and use such force as may be necessary to eject the said C. A. Firth and his assistants or any other person interfering with the administration of the waters of said river by the said State Engineer, and you will govern yourself accordingly.

Yours very truly,

(Signed)

JOHN E. MILES,

Governor. [701]

## RESPONDENTS' EXHIBIT No. 3.

A. T. HANNETT

Attorney at Law

First National Bank Bldg.

P. O. Box 497

Albuquerque, New Mexico

November 25, 1938

Honorable Thomas McClure,  
State Engineer,  
Santa Fe, New Mexico

Dear Mr. McClure:

At a meeting of the Interstate Streams Commission, held on November 22, at your office, a committee appeared in behalf of the water users of the Gila River in New Mexico, inquiring as to their rights and the rights of the State and of your office relative to a decree entered June 29, 1935, in a case in the District Court of the United States in and for the District of Arizona, entitled "United States of America vs. Gila Valley Irrigation District, et al.," No. Globe Equity 59.

After a careful investigation of the law touching this matter, I have reached the following conclusion:

That as to individuals who appeared in this litigation and submitted themselves to the jurisdiction of the court, they are in all probability bound by the court's decision.

From information given by you and others at the meeting of the Interstate Streams Commission,

I take it for granted and am assuming that neither the Attorney General of the State of New Mexico, the State Engineer, nor any other official of the State of New Mexico ever entered an appearance in this litigation, and that the State of New Mexico never became a party to this litigation. Of course, the State could not properly have been sued [702] in this court in that the Supreme Court of the United States is the only forum which has jurisdiction over any one of the forty-eight sovereign states.

Section 2, Article XVI of the Constitution of the State of New Mexico provides:

“The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public and to be subject to appropriations for beneficial use in accordance with the laws of the state. Priority of appropriation shall give the better right.”

I also understood from the information given me at said meeting that neither the United States of America, nor any citizen nor body corporate of the State of Arizona has ever filed with the State Engineer of the State of New Mexico any application for the appropriation of the waters of the Gila River or any of its tributaries as required by our statutes. It is undoubtedly true that Arizona and its inhabitants are entitled to an equitable apportionment of the waters of the Gila. However, the above-mentioned suit was not one, as I understand

it, and could not be one for the purpose of dividing the waters of the river in question between the states and their inhabitants.

I have not seen the complaint, but I take it from the judgment or decree that the suit is in the nature of an action to quiet title to the waters and could not possibly affect anyone who was not a defendant. I understand that there are likewise users of water with valid, subsisting and prior appropriations on the Gila who were never made parties to this suit to quiet [703] title in the United States Court of Arizona. The United States Court for Arizona had jurisdiction only in personam of residents of the State of New Mexico made parties to this litigation who submitted themselves to the jurisdiction of the court. See annotation following the case of *Gunter v. Arlington Mills*, 71 A. L. R. 1351, which reviews all of the authorities except the case of *United States v. Walker River Irrigation District, et al.*, a district court decision of the District Court of Nevada, reported in 11 Fed. Supp. at page 158. The last mentioned case likewise reviews the decisions of the Ninth Circuit Court of Appeals of the United States.

It is my opinion that the residents of the State of New Mexico who submitted to the jurisdiction of the federal court of Arizona in the suit in question did not, and could not, surrender to either the United States or the State of Arizona, or any of its inhabitants any title to the waters of the Gila River, in the face of our constitutional provision above quoted. By complying in obtaining a water

right under our statute, they obtained the usufruct of the stream for domestic and agricultural purposes but they could neither surrender nor abandon that for use in a foreign state as the title under the constitutional provision remained in all of the waters so far as New Mexico's equitable share thereof is concerned in the sovereign state of New Mexico in the nature of a remainder-man as trustee for the public, to be subject to appropriation only under the laws of the State of New Mexico.

As to the Commissioner appointed to enforce the decree in No. 59 Equity, United States of America v. Gila Valley Irrigation District, et al., entered June 29, [704] 1935, the court exceeded its jurisdiction in appointing this officer to carry out its orders outside of the court's territorial jurisdiction so far as the sovereign State of New Mexico is concerned.

It is my opinion that you may take such steps as you deem necessary to prohibit the interference by such Commissioner with the administration of the waters of the Gila River within the boundaries of New Mexico, and that it is your right and your duty to forbid him to interfere with the waters of the Gila River within the boundaries of New Mexico to the detriment of the State or its water users. I suggest, therefore, that you govern yourself accordingly.

Respectfully yours,

(Signed) A. T. HANNETT,  
Special Assistant Attorney General and Attorney  
for Interstate Streams Commission.

RESPONDENTS' EXHIBIT No. 5

State of New Mexico,  
County of Santa Fe,  
In the Office of the State Engineer.  
In the Matter of a Water District for The Gila  
River Stream System, Hidalgo County, New  
Mexico.

ORDER CREATING DISTRICT

This matter coming in for consideration of the State Engineer pursuant to instructions given him by resolution of the Interstate Stream Commission for the State of New Mexico, said resolution being passed at meeting of said Commission on December 21, 1938, and it further [705]

Appearing to the State Engineer that the administration of a certain decree of the United States District Court for Arizona insofar as the State of New Mexico is concerned and its proprietary interests in the waters of the Gila River, that the court acted without jurisdiction, and it is the purpose of the undersigned, to exercise his jurisdiction over the waters of the Gila River in New Mexico;

Now, Therefore, It Is Ordered that all the Gila River System in Hidalgo County, New Mexico, be and the same hereby is created and declared to be a water district known and designated as the Lower Gila River Water District for the purpose of having the waters of said stream system apportioned and distributed by a water master, as provided by the Statutes of the State of New Mexico.

Done at Santa Fe, New Mexico, this 31st day of December, 1938.

[Seal] (Signed) THOMAS M. McCLURE,  
State Engineer.

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### RESPONDENTS' EXHIBIT No. 6

Office of State Engineer,  
County of Santa Fe,  
Santa Fe, New Mexico.

### ORDER APPOINTING WATER-MASTER

I, Thomas M. McClure, State Engineer of the State of New Mexico, by virtue of the authority vested in me by the laws of the State, do hereby appoint C. B. Tooley as Water-Master of the Lower Gila River District, effective the 1st day of January, 1939, for the purpose of administering, carrying out and enforcing the valid water rights of the Gila River within said [706] district; that said Water-Master shall have all the powers and authority with reference to said water in the aforesaid District and the users thereof as are conferred upon a Water-Master under the provisions of Chapter 151, New Mexico Statutes, 1929 Compilation.

In Witness Whereof, I have hereunto set my hand and official seal this 31st day of December, A. D., 1938.

(Signed) THOMAS M. McCLURE,  
State Engineer.

RESPONDENTS' EXHIBIT No. 7

"In the District Court of the United States for the District of Arizona.

In Equity  
No. E-59-Globe

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GILA VALLEY IRRIGATION DISTRICT,  
et als.,

Defendants.

Under authority contained in the Decree entered June 29, 1935 in the above cause, the Gila Water Commissioner is in direct charge of all diversions of irrigation water from the Gila River. Notice is hereby given that all persons are warned not to change, alter, tamper, or interfere with the regulation of this headgate. Closed for Non Payment Assessment Due Jan. 1-1939. J. L. Spaw, acting under direct instructions of the Gila Water Commissioner, is the only person authorized to make any changes in the regulation of this gate.

C. A. FIRTH,

Gila Water Commissioner, Safford, Arizona.

Dated this 4th day of Jan. 1939. 10:15 A. M.

(Signed)

C. A. FIRTH. [707]

## RESPONDENTS' EXHIBIT No. 8

## Office of State Engineer

County of Santa Fe,  
Santa Fe, New Mexico.

## ORDER APPOINTING WATER-MASTER

I, Thomas M. McClure, State Engineer of the State of New Mexico, by virtue of the authority vested in me by the laws of said state, do hereby appoint Hugh Pace as Water-Master of the Lower Gila District, effective the 22nd day of February, 1939, for the purpose of administering, carrying out and enforcing the valid water rights of the Gila River within said district; that said Water-Master shall have all the powers and authority with reference to said water in the aforesaid district and the users thereof as are conferred upon a Water-Master under the provisions of Chapter 151, New Mexico Statutes, 1929 Compilation.

In Witness Whereof, I have hereunto set my hand and official seal this 21st day of February, A. D. 1939.

[Seal] (Signed) THOMAS M. McCLURE,  
State Engineer.

RESPONDENTS' EXHIBIT No. 9

C. A. Firth, Commissioner

United States of America

vs.

Gila Valley Irrigation District Et Al.

E-59 Globe

Office of the  
Gila Water Commissioner

P. O. Box 158  
Safford, Arizona

January 14, 1939

Filed Jan. 16, 1939. Office State Engineer, Santa Fe, N. M.

Mr. Thomas M. McClure  
State Engineer [708]  
Santa Fe, New Mexico

Dear Mr. McClure:

In accordance with the Federal Court Decree, it will be necessary that water be delivered to 318.7 acres of lands having rights in Arizona under the Sunset Canal, and also to 1779.6 acres under the Moddle Canal. The present apportionment is 0.1 acre feet per acre.

In all probability there will be a small demand for water for grain and hay land within the next two or three weeks and I want to do everything possible to see that these farmers in Arizona under these canals that have their headings in New Mexico get what water they are entitled to.

As I understand the situation, you are constructing now controls and waste-ways at the Arizona line and will be prepared to measure through Parshall flumes any water that is turned into Arizona. Mr. Tooley told Mr. Spaw, my deputy at Duncan, that he wanted some sort of a written request for quantities and time that water was to be turned to these canals and for this reason I am at this time asking you just what form you will require on this notice and what your regulations will be. If you will send me a sample of the request, I will be glad to give same careful consideration.

These lands in Arizona, in addition to the quantities of water they may be entitled to under apportionment, will still have diversion rights on general priority when the river state is sufficiently high. Normally we may expect such conditions during February and March and at that time I would require about 4. second feet down the Sunset and about 22.0 second feet down the Moddle. [709]

Thanking you to give this matter your attention,  
I am

Very truly yours,

(Signed)

C. A. FIRTH,

C. A. FIRTH,

Gila Water Commissioner.

RESPONDENTS' EXHIBIT No. 10

State of New Mexico

Office of  
State Engineer  
Santa Fe

Thomas M. McClure

State Engineer

January 18th, 1939

Mr. C. A. Firth,  
Gila Water Commissioner,  
P. O. Box 158,  
Safford, Arizona.

Dear Mr. Firth:

I am in receipt of your letter of January 14th relating to the release of water to the Arizona users.

I am sending under separate cover a pad of the form we use for requests for release of water by our water masters.

In the use of this form if you will fill in under each ditch the cubic feet per second you desire to have released in each ditch and the time release shall begin from our control near the state line, also the time when it shall cease, we can then cooperate with you so that the exact proportionment under the decree can be delivered to Arizona lands.

If you do not have an apportionment to be made in all three of the ditches at the same time, write the word [710] "None" in line after the ditch or ditches you are not requesting water for.

We are glad to cooperate with you in any manner

to fulfill your duties as Commissioner in serving the lands in Arizona under these ditches.

Very truly yours,  
(Signed) THOMAS M. McCLURE,  
State Engineer.

**RESPONDENTS' EXHIBIT No. 12**

State of New Mexico  
Office of  
State Engineer

Thomas M. McClure  
State Engineer

Santa Fe, December 28, 1938

Honorable Albert M. Sames  
Judge of the United States District Court  
Tucson, Arizona

Re: No. E-59-Globe

## United States of America

VS.

## Gila Valley Irrigation District, et al.

Dear Sir:

Pursuant to instructions given me by resolution of the Interstate Streams Commission for the State of New Mexico, a copy of which is annexed to this letter, I am handing said resolution to you.

I was likewise advised by the Commission and its attorney that it is not the attitude of the Interstate Streams Commission to be contumacious concerning

the court's decree in this matter, but that the Interstate Streams Commission is convinced that in the decree so far as the State of New Mexico is concerned and its [711] proprietary interests in the waters of the Gila that the court acted without jurisdiction, and that it is the purpose of the Interstate Streams Commission, through the undersigned, to exercise its jurisdiction over the waters of the Gila.

However, the Interstate Streams Commission and the undersigned believe that an amicable adjustment of the matter can be arranged if a meeting can be held with responsible officials of the two states and the United States representing the Indians and either a compact entered into between the states or some other satisfactory adjustment which will be fair and equitable.

From the information and investigations made by this department, we have reached the conclusion that the water is not being equitably distributed and that citizens holding prior rights to waters of the river in this State are being deprived of their rights.

I wish to assure you in my own behalf and in the behalf of the Commission that we would be happy to meet with responsible officials for a discussion of this matter at any time that suits the convenience of such officials.

Respectfully,

(Signed)

THOMAS M. McCCLURE,  
State Engineer.

RESPONDENTS' EXHIBIT No. 16

## Board of Supervisors

Clyde Tingley, Governor

Grover Conroy,

**State Highway Engineer,**

### Secretary.

Chief

E. J. House, Jr.

Address all Communications to New Mexico

State Police [712]

Joseph R. Gallegos,

Santa Fe, N. M.

## Member

Box 919

State of New Mexico  
Department of Justice  
New Mexico State Police

January 3, 1939

Mr J. O. Bradford

New Mexico State Police,  
Lordsburg, New Mexico

Dear Sir:

This will serve to introduce Mr. Thomas M. McClure, State Engineer, whom you are instructed to assist in any way possible in order that he may carry out his jurisdiction.

He will explain the circumstances.

Very truly yours,

(Signed)

E. J. HOUSE, JR.,

Chief, New Mexico State Police.

RESPONDENTS' EXHIBIT No. 17  
“ARTICLES OF INCORPORATION  
OF  
THE SUNSET DITCH COMPANY

Know All Men By These Presents, that we, the undersigned George H. Cooper, John A. Martin, Sarah A. Moore, Samuel A. Foster and Joseph E. Williams all citizens of the United States of America and the Territory of New Mexico, and all residents of the County of Grant in said Territory, do hereby voluntarily associate ourselves together for the purpose of forming a corporation under [713] the laws of said Territory of New Mexico:

And We Do Certify:

Article I.

The corporate name of said corporation shall be The Sunset Ditch Company.

Article II.

The purposes for which said corporation is formed are as follows, to-wit: (a) To construct, operate and maintain the following mentioned described ditch and water way in said County of Grant and Territory of New Mexico, having for its object the taking and conducting of water from the Gila River in said Grant County, Territory of New Mexico, and the supplying of the same for the purposes of irrigating and improving lands, agricultural, stock-raising, domestic and other beneficial and useful purposes in said County of Grant and Territory of New Mexico, said ditch and water-

way being more particularly described as follows, to-wit:

Said ditch shall be known as "The Sunset Company's Ditch," and shall have a carrying capacity as follows, to-wit, ten feet wide on bottom, and not to exceed four feet in depth; said ditch being more particularly described by the survey of the line thereof as follows, to-wit:

Beginning at a—on a perpendicular bluss on the north side of the Gila River, being S. 7° 45' E. 2683 ft. from the N.W. corner of Sec. 21, Twp. 19 S., R. 20 W. of the N.M.P.M. (b) To construct, operate and maintain all necessary and proper plants, appliances, machinery, dams ditches, pipelines and water ways for distributing said water from the above mentioned and described ditch, or for more effectually carrying out the said purposes of [714] said operation. (c) To acquire, own, lease, sell and transfer real estate and personal property; and generally to do all things necessary or proper in carrying on the business and promoting the said purposes for which said operation is formed.

### Article III.

The amount of capital stock of said corporation shall be Fifty Thousand Dollars, divided into Two Hundred Shares of the par value of Twenty Five Dollars per share.

### Article IV.

The time for which said corporation shall exist is fifty years from and after the date of its incorporation.

## Article V.

The number of directors of said corporation shall be three. The names of the directors who shall manage the business of said corporation for the first year of its existence are the said George H. Casper, John A. Martin, Samuel A. Foster.

## Article VI.

The principal place of business of said corporation shall be located at the town of Richmond, in the County of Grant, Territory of New Mexico.

In Witness Whereof, we have hereunto set our hands and affixed our seals this Second day of February A. D. 1903.

[Seal] (Signed) GEORGE H. CASPER

[Seal] (Signed) JOHN A. MARTIN

[Seal] (Signed) SARAH A. MOORE

[Seal] (Signed) SAMUEL A. FOSTER

[Seal] (Signed) JOSEPH E. WILLIAMS [715]

Territory of Arizona,  
County of Graham—ss.

On this Second day of February, A. D. 1903, before me the undersigned Notary Public, personally appeared George H. Casper, John A. Martin, Sarah A. Moore, Samuel A. Foster and Joseph E. Williams, to me known to be the persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal at Duncan, Graham County, Arizona Territory the day and year in this certificate aforesaid.

[Seal] (Signed) J. L. T. WATTERS,  
Notary Public.

My Commission expires November 24, 1905.

(Cover indorsements)

No. 3343

Cor. Rec'd. 5 Page 231

Articles of Incorporation of The Sunset  
Ditch Company  
Indexed "3343"

Filed in Office of Secretary of New Mexico, Feb.  
9, 1903. 9 A. M.

J. W. REYNOLDS,  
Secretary.

Filing 15—I C C 4.50" [716]

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CONDENSED STATEMENT OF REPORTER'S  
TRANSCRIPT OF TESTIMONY AND  
PROCEEDINGS BEFORE  
HONORABLE ALBERT M. SAMES, JUDGE,  
TUCSON, ARIZONA, MARCH 11, 1940  
(RULE 75-b)

The Court: This is the time, Gentlemen, to consider the findings that have been submitted on the part of the Government and the respondents in the

determination of the judgment along the lines as indicated by the Court some weeks ago.

Gov. Hannett: Now comes the respondents, before judgment entered herein, and respectfully requests the Court to rule as to whether or not the 13¢ per acre for the year 1939 has been merged into the judgment of \$100 each against the respective respondents, or whether the Court rules that they are still indebted to the Commissioner Firth in the sum of 13¢ per acre for the year 1939; and as part of this motion the Court's attention is directed to the fact that the Commissioner Firth has recently made demand on the alleged officers of the alleged Sunset Canal Company for 13¢ per acre for the year 1939 for all who used water on the Sunset Ditch, including each of these respondents, and further, whether these individual respondents may pay 13¢ per acre for the year of 1940 and thereupon receive water, under their water rights for the land owned by them, regardless of whether the other users of water pay for that year or whether the Sunset Canal pays for that year.

The Court: You think that raises any matter that is in issue now or that was at issue?

Gov. Hannett: I think it does.

The Court: It occurred to me that possibly in abatement, as this is a civil proceedings and the recovery is for such damages as may be required, for that reason [717] there might be some basis for your motion. Is that it?

Gov. Hannett: We would like to know whether the 13¢ per acre is included in this judgment of

\$100 each or whether they still owe the 13¢ for the year 1939.

The Court: The findings of the Government is that, on account of the failure to pay the 13¢ per acre that the Water Commissioner has been put to the expense of litigation and the added expense of attempting to enforce the decree. That is your *dingings*, Mr. United States Attorney?

Mr. Flynn: Yes, your Honor.

Gov. Hannett: And do I understand that your Honor proposes to make that finding?

The Court: I haven't heard you gentlemen on it yet. It is one of the findings that has been submitted by the Government here, or the petitioner.

Gov. Hannett: We do not care to make any argument, if your Honor please, any further argument.

Mr. Flynn: At this time we have none. I assume the Court will rule now?

The Court: Yes, the motion will be denied.

Gov. Hannett: At this time, if the Court please, we want the record to show this, we ask that the record show before the entry of judgment and before the findings of fact and conclusions of law have been settled subsequent to the hearing and subsequent to the Court's announcement that he fines each of the defendants the sum of \$100, that we object to the Court's imposition of a fine of \$100 each because it is for a round sum of money, not based upon any proved items of loss or expense, but apparently intended to cover probable losses

and expenses, and that if it is imposed by way of indemnity to the aggrieved party, the petitioner, it should not exceed his actual loss incurred [718] by the violation of the injunction, including the expenses of the proceedings necessitated in presenting the offense for the judgment of the Court; and further, that the imposition of the \$100 fine each against each of the respondents is not based upon evidence showing the amount of loss and expense and the said sum of \$100 each is necessarily arbitrary and arrived at by conjecture, and such being the case, the question of its reasonableness cannot be re-examined upon the appeal from the final decree in this cause, and the Appellate Court will necessarily have to treat the fine as a purely arbitrary one or deny the respondents their right to review. The Court's attention is likewise called to the fact that the following named persons, Anna H. Lunt, R. Richens, Ralph Richardson, E. Thygerson, Nancy A. Smith and B. Y. Whipple, each used water for only 1.1 acres of land, which was delivered to them by the municipality of the Town of Virden, which Town is not a party to the original cause or a defendant therein, and that as to the other named respondents against whom the fine of \$100 was assessed, there is no showing as to the amount of acreage for which they used water.

The Court: That is embodied in one of your instructions? Embodied, I should say, in your findings?

Gov. Hannett: Yes, your Honor, but we want the record to show it. As I understand it, under the new rules, with requested findings of fact and conclusions of law, it isn't necessary even to file them and so they are not necessarily a part of the record, and we want the record to show that at this time, and have the record show it is before the Court and the Court considered it.

The Court: Very well. [719]

Gov. Hannett: If the Court please, these findings of fact, number one, proposed by the Government, it would leave the impression that it was only to irrigate the land of Indians. That is not true. As I understand it, there is as much white land as Indian land under this decree, and the decree so shows. That is their new proposed findings of fact number one.

Mr. Flynn: This was instituted by the Government on behalf of the Indians, to determine their respective rights to the use of water from the Gila River and the Gila Valley Irrigation District and other residents of the State of Arizona were made respondents.

Gov. Hannett: Your Honor, for the purposes of the record, there are vast tracts of land owned by white settlers near that owned by the Indians, and the amended complaint in this cause of action recites that it was brought for their benefit as well as the benefit of the Indians.

The Court: That is the only objection you want to point out to the Court with regard to the sub-

stitution of this page one and page one-a? The findings of fact, I think, is a repetition of their first one.

Mr. Flynn: Yes, it is identical with the first one, only we set it up on a separate page there to avoid re-writing the whole findings.

The Court: Now, I understand, of course, Gentlemen, that these proposed findings of fact on behalf of the respondents which have been submitted here are findings based on the line of argument that the Court heard here at the hearing some weeks ago. Is there any occasion for the Court to hear any further opposition on the part of the respondents for the findings that have been [720] submitted by the petitioner, or for urging the Court to consider anything further, urging the Court to consider any of the findings now submitted?

Gov. Hannett: If the Court please, there is one particular finding that we would like to have, if the Court is going to adopt the findings of the Government verbatim, the ones they have submitted, we would like to have this clarified. That is, concerning the activities of the Governor of New Mexico and the State Engineer and the State Police. We have made a requested finding of fact and conclusion of law that they were not the agents of these respondents, and we also request the Court to find that none of these respondents individually did any act toward breaking any lock or diverting any water or opening any headgate. The evidence in that respect is to the effect that they did not do that, but

that the State Engineer and the State Police officers, acting under the direction of the Governor of New Mexico, did those physical acts, and we object to the Court's finding that these respondents did it, when the record shows the contrary.

The Court: Well, as I recall the testimony, for no transcript of the testimony was afforded the Court, but I relied largely upon my recollection, but my impression of the testimony was from one or two of the respondents' witnesses, that they were the State officials and that they acquiesced. Perhaps that impression might not be borne out by the testimony but, as I recall it, it seems to me there was some acquiescence by the Virden people.

Gov. Hannett: Yes, we agree that they acquiesced and there is a lot of difference between acquiescence and actually going out and breaking gates and breaking locks. I think if it was modified to acquiescence, [721] we would have no objection, but to find they did something they did not do, we would object.

Mr. Flynn: Our findings are that they broke or caused them to be broken, their act resulted in the breaking of the lock on the part of the officials, and we think the evidence supports that.

Gov. Hannett: The only ones of the defendants who appeared before the Interstate Stream Commission were Parley P. Jones and Henry L. Smith, and they made a complaint, and there is no showing that anyone else did, and both of them are respondents. I understand there was one other party

with them. There is no charge of conspiracy, if the Court please, neither urged nor any evidence of it. The charge is agency.

The Court: If I understand the Government's position here, the offense was failing to make their payments on the assessments?

Mr. Flynn: Yes, your Honor.

The Court: I think I will let that finding stand. Were there other findings that you wanted to discuss?

Gov. Hannett: Do I understand by that that the Court rules that the Governor of New Mexico and the State officials were the agents of these defendants?

The Court: I am looking now at Finding Number 15-A, that about the 4th day of January, 1939, the said respondents hereinbefore named wilfully and unlawfully broke or caused to be broken the locks on said structures and caused other locks to be placed thereon.

Gov. Hannett: Yes, that is the one, and I understand that your Honor rules that the State officials who did this were the agents of these respondents. That is the charge in their complaint. [722]

Mr. Flynn: That is not the whole charge. I don't think we have to prove they were agents.

The Court: Well, the finding will stand.

Gov. Hannett: And the Court does not rule whether or not they are agents?

The Court: The recital there speaks for itself.

The Court: Well, we had under consideration,

when we recessed, what the amount of the appeal bond would be here, and I understand from you gentlemen that the amount of the fine as to each defendant and five hundred dollars to cover the costs, is that correct?

Gov. Hannett: Yes, your Honor.

The Court: All right; it will be fixed in that amount. [723]

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State of Arizona,  
County of Pima—ss.

I, Gertrude E. Mason, do hereby certify that I am the assistant to the official court reporter in and for the United States District Court at Tucson, Arizona; that as such assistant court reporter I was present at the hearing in the above entitled matter before the Hon. Albert M. Sames, Judge, and took down in shorthand the proceedings had at said hearing, and later reduced my shorthand notes to type-writing, the foregoing on thirty-six pages, being a full, true and correct transcript thereof, to the best of my skill and ability.

Witness my hand this 13th day of March, 1940.

(Signed)           GERTRUDE E. MASON,

Assistant Court Reporter.

A. T. HANNETT,

M. C. MECHEM,

Attorneys for Appellants.

Received copy this 9th day of April, 1940.

H. S. McCLUSKEY,

JOHN C. GUNG'L,

By H. S. M.

Attorneys for Appellees. [724]

[Endorsed]: Filed Apr. 9, 1940. [725]

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[Title of District Court.]

May 1940 Term

At Tucson

MINUTE ENTRY OF THURSDAY,

MAY 16, 1940

(Globe Division)

Honorable Albert M. Sames, United States District  
Judge, Presiding

[Title of Cause.]

On motion of Messrs. Mechem and Hannett, at-  
torneys for appellants, filed herein,

It is ordered that the appellants in the contempt  
proceedings be allowed to substitute for page one  
of Statement of Points to be Relied Upon by Ap-  
pellants, filed April 9, 1940, entitled "R. W. Brooks,  
et al., Appellants, vs. United States of America and  
C. A. Firth, Appellees", a page entitled "United  
States of America, Plaintiff, vs. Gila Valley Irriga-  
tion District, et al., Defendants", and

It is ordered that the Clerk of this Court make  
said substitution.

It is further ordered that the appellants in the  
contempt proceedings be allowed to substitute for  
page one of Condensed Statement of Reporter's

Transcript of Testimony, filed herein April 9, 1940, entitled "R. W. Brooks, et al., Appellants, vs. United States of America and C. A. Firth, Appellees," a page entitled "United States of America, Plaintiff, vs. Gila Valley Irrigation District, et al., Defendants", and

It is ordered that the Clerk of this Court make said substitution. [726]

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[Title of District Court and Cause.]

#### STIPULATION

It is hereby and herein stipulated by and between counsel for appellants and appellees, that in making up the designation of parts of contents of record on appeal and record on appeal the Clerk of the United States District Court for the District of Arizona shall certify a copy of the decree entered June 29, 1935, including the stipulation for consent to the entry of final decree, as printed by the United States Government Printing Office in 1935 (as shown on the last page thereof), along with the record; and a certified copy of the bound reports of Charles A. Firth, the Court's Water Commissioner, for the years 1936, 1937 and 1938, and the reports for the year 1939 up to November 9, 1939;

It is further stipulated that the appellees herein shall furnish to the Clerk of the Court copies of said instruments to be certified by the said Clerk, and that the appellees herein shall furnish to the Appellate Court four (4) copies each of said instruments in addition to the certified copies;

It is further stipulated that the said instruments shall not be printed as part of the record in this cause but that said instruments may be considered by the Court as a part of the record in this cause for the purpose of appeal, and all the parts thereof which shall be referred to in the briefs shall be published in an appendix to the brief; [727]

It is further stipulated, in regard to the amended complaint referred to in paragraph numbered "13 (d)" of the "Designation of Contents of Record on Appeal", that, in order to avoid setting out the numerous parties-defendant, the record shall show, as set out in said paragraph 13 (d) of the designation of contents of record on appeal, the following:

"The complaint in paragraph I, in addition to the foregoing, named as defendants some 40 canal or ditch companies and irrigation districts and approximately 1500 defendants, comprising municipal corporations, school districts, corporations and persons, residents of Arizona and New Mexico, who are not Indians or wards of the United States or represented by the United States."

Dated April 9, 1940.

H. VEARLE PAYNE,

L. P. McHALFFEY,

Lordsburg, New Mexico.

Of Counsel:

M. C. MECHEM,

A. T. HANNETT,

P. O. Box 497,

Albuquerque, New Mexico.

Attorneys for Appellants.

JOHN C. GUNG'L,  
By HSM  
Consolidated National  
Bank Bldg., Tucson, Ariz.  
Attorney for C. A. Firth.

FRANK E. FLYNN,  
United States Attorney,  
204 U. S. Court House,  
Phoenix, Arizona.

H. S. McCLUSKEY,  
Special Attorney,  
Ellis Building,  
Phoenix, Arizona.

Attorneys for Appellees. [728]

[Endorsed]: Filed Apr. 9, 1940. [729]

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[Title of District Court and Cause.]

ORDER

This cause coming on to be heard upon motion of the Respondents who have taken an appeal from the judgment of the Court herein finding them guilty of contempt of Court and fining them, for an order directing the Clerk of this Court to file the supersedeas bond heretofore given and approved by this Court on a date subsequent to the entry of this order,

And the Court being fully advised in the premises, it is by the Court

Ordered, that said prayer be granted and that

the Clerk of this Court is hereby directed to file said bond as of this date.

April 10th, 1940.

ALBERT M. SAMES,  
United States District Judge.

[Endorsed]: Filed April 10, 1940. [730]

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[Title of District Court and Cause.]

EXTRACTS OF REPORTS OF C. A. FIRTH,  
WATER COMMISSIONER FOR THE DIS-  
TRICT OF ARIZONA FOR THE MONTHS  
OF JANUARY TO OCTOBER, 1939, IN-  
CLUSIVE, AS PER APPELLANTS' DES-  
IGNATION OF PARTS OF RECORD,  
ITEM NO. 20, PAGE 14, AND STIPULA-  
TION THEREIN MENTIONED.

1. The following excerpts from the January, 1939, report, page 1:

"Two apportionments were made during January to the "Upper Valleys" the total of which amounts to 0.25 acre feet per acre.

"The lake elevation of the San Carlos Reservoir at midnight January 31 was 2,390.36 feet, with 10,210 acre feet of available stored water, gaining 5,900 acre feet during the month. Computed evaporation amounted to 254 acre feet. Water discharged from the dam amounted to 5,810 acre feet according to the U. S. G. S. Records, with a maximum discharge of 145 second feet.

"The indicated consumptive use to date for the "Upper Valleys" calculated in accordance with the decree amounted to—440 acre feet.

"Officials of the State of New Mexico having by force on January 4, 1939, taken control of the canals diverting in New Mexico, the amounts of water diverted by the Sunset, Moddle and Shriver Canals are not shown in this report. It is hoped that the question of jurisdiction over these canals may be legally settled in the near future. The Gila Water Commissioner cannot officially recognize any jurisdiction over the appropriated waters of the Gila River within the territorial scope of the Decree by others.

"Financial: The Sunset Canal Company (New Mexico) is delinquent in the sum of \$158.19; The Moddle Canal Company (New Mexico lands), the sum of \$17.50; York Cattle Company, \$3.24; J. H. Brown, \$1.46; and Tidwell Canal Company the sum of \$29.64. All the above amounts were due and payable January 1, 1939." [731]

2. The following excerpts from the February, 1939, report, page 1:

"One apportionment was made to the Upper Valleys during February amounting to 0.25 acre feet per acre. Total apportionments to date amount to 0.50 acre feet per acre.

“The indicated consumptive use to date for the “Upper Valleys” calculated in accordance with the decree amounted to—1260 acre feet.

“Financial: The Sunset Canal Company (New Mexico) is delinquent the sum of \$158.19; The Moddle Canal Company (New Mexico) is delinquent the sum of \$17.50; York Cattle Company \$3.24; and J. H. Brown is delinquent the sum of \$1.46. All the above amounts were due and payable January 1, 1939.”

3. The following excerpts from the March, 1939, report, page 1:

“One apportionment was made to the Saf-ford, Duncan and Winkelman valleys during March amounting to 0.08 acre feet per acre. Total apportionments to date amount to 0.58 acre feet per acre.

“The lake elevation of the San Carlos reservoir at midnight March 31st was 2398.41 feet, with 25,090 acre feet of available stored water, gaining 5,110 acre feet during the month. Computed evaporation amounted to 738 acre feet. Water discharged from the dam amounted to 13,810 acre feet with a maximum discharge of 300 second feet.

“The indicated consumptive use to date for the Upper Valleys calculated in accordance with the decree amounted to 13,620 acre feet.

“Financial: The Sunset Canal Company (New Mexico) is delinquent \$158.19; The Moddle Canal Company (New Mexico lands) is de-

linquent \$17.50. These amounts were due and payable on or before January 1st, 1939.” [732]

4. The following excerpts from the April, 1939, report, page 1:

“One apportionment was made to the saf-ford, Duncan and Winkelman valleys during April amounting to 0.13127 acre feet per acre. Total apportionments to date amount to 0.71127 acre feet per acre.

“The lake elevation of the San Carlos reservoir at midnight April 30th was 2396.45 feet, with 21,100 acre feet of available stored water, losing 3,980 acre feet during the month. Computed evaporation amounted to 1,223 acre feet. Water discharged from the dam amounted to 22,480 acre feet with a maximum discharge of 487 second feet.

“The indicated consumptive use to date for the “Upper Valleys” calculated in accordance with the decree amounted to 24,190 acre feet.

“Financial: The following accounts are delinquent, having been due and payable on or before January 1, 1939; The Sunset Canal Company (New Mexico) \$158.19; The Moddle Canal Company (New Mexico lands) \$17.50.”

5. The following excerpts from the May, 1939, report, page 1:

“The lake elevation of the San Carlos reservoir at midnight May 31st was 2,389.16 feet, with 8,320 acre feet of available stored water,

losing 12,780 acre feet during the month. Computed evaporation amounted to 1,438 acre feet. Water discharged from the dam amounted to 15,460 acre feet, with a maximum discharge of 365 second feet.

"The indicated consumptive use to date for the "Upper Valleys" calculated in accordance with the decree amounted to 28,130 acre feet.

"Financial: The following accounts are delinquent, having been due and payable on or before January 1, 1939; The Sunset Canal Company (New Mexico) \$158.19, and The Moddle Canal Company (New Mexico lands) \$17.50."

6. The following excerpts from the June, 1939, report, page 1:

"The lake elevation of the San Carlos reservoir at midnight June 30th was 2,383.75 feet, with 900 acre feet of available stored water, losing 7,420 acre feet during the month. Computed evaporation amounted to 1,339 acre feet. Water discharged from the dam amounted to 6,740 acre feet, with a maximum discharge of 186 second feet.

"Financial: The following accounts are delinquent, having been due and payable on or before January 1, 1939: The Sunset Canal Company (New Mexico) \$158.19, and The Moddle Canal Company (New Mexico lands) \$17.50."

7. The following excerpts from the July, 1939, report, page 1:

"The lake elevation of the San Carlos reservoir at midnight July 31 was 2,383.42 feet, with 504 acre feet of available stored water, losing 396 acre feet during the month. Computed evaporation amounted to 1,187 acre feet. Water discharged from the dam amounted to 286 acre feet, with a maximum discharge of 22 second feet.

"Financial: The following accounts are delinquent, having been due and payable on or before January 1, 1939: the Sunset Canal Company (New Mexico) \$158.19, and The Moddle Canal Company (New Mexico lands) \$17.50."

8. The following excerpts from the August, 1939, report, page 1:

"The lake elevation of the San Carlos reservoir at midnight August 31st was 2,389.52 acre feet, with 8,880 acre feet of available stored water, gaining 8,376 acre feet during the month. Computed evaporation amounted to 1,315 acre feet. Water discharged from the dam amounted to 10,460 acre feet, with a maximum discharge of 343 second feet.

"Financial: The following accounts are delinquent: Sunset Canal Company (New Mexico) \$316.38; Moddle Canal Company (New Mexico lands) \$35.00."

9. The following excerpts from the September, 1939, report, page 1:

"The lake elevation of the San Carlos reservoir at midnight September 30th was 2,389.55 acre feet, with 8,920 acre feet of available stored water, gaining 40 acre feet during the month. Computed evaporation amounted to 1,014 acre feet. Water discharged from the dam amounted to 9,960 acre feet, with a maximum discharge of 290 second feet.

"Financial: The following accounts are delinquent: Sunset Canal Company (New Mexico) \$316.38; Moddle Canal Company (New Mexico lands) \$35.00."

10. The following excerpts from the October, 1939, report, page 1:

"The lake elevation of the San Carlos reservoir at midnight October 31st was 2,395.59 feet, with 19,410 acre feet of available stored water, gaining 10,490 acre feet during the month. Computed evaporation amounted to 870 acre feet. Water discharged from the dam amounted to 11,360 acre feet, with a maximum discharge of 226 second feet. [734]

"Financial: The following accounts are delinquent: Sunset Canal Company (New Mexico) \$316.38; Moddle Canal Company (New Mexico lands) \$35.00."

[Endorsed]: Filed Apr. 29, 1940. [735]

[Title of District Court.]

April 1940 Term At Phoenix

MINUTE ENTRY OF SATURDAY,

MAY 18, 1940

(Globe Division)

Honorable Dave W. Ling, United States District  
Judge, Presiding.

[Title of Cause.]

On motion of H. S. McCluskey, Esquire, special  
counsel for the appellee,

It is ordered that the Clerk of this Court with-  
draw page two from Extracts of Reports of C. A. Firth, Water Commissioner for the District of Ari-  
zona for the Months of January to October, 1939,  
Inclusive, as per Appellants' Designation of Parts  
of Record, Item No. 20, Page 14, and Stipulation  
Therein Mentioned, filed April 29, 1940, and substi-  
tute in lieu thereof page two, now presented, identi-  
cal with said page to be withdrawn but with lines  
7 to 16, inclusive thereof, deleted therefrom. [736]

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[Title of District Court and Cause.]

STIPULATION

It is herein and hereby stipulated by and between  
H. Vearle Payne, L. F. McHalffey, M. C. Mecham  
and A. T. Hannett, attorneys for respondents, and  
F. E. Flynn, United States Attorney, H. S. Mc-  
Cluskey, Special Attorney, and John C. Gung'l, at-  
torneys for petitioners, that section 20, line 32,  
page 14, and line 1, page 15, of Statement of Points

to be Relied Upon by Defendants, together with Designation of Parts of Record, and that section of the Stipulation referred to therein, reading as follows: “\* \* \* and certified copies of the bound reports of Charles A. Firth, the Court’s Water Commissioner, for the years 1936, 1937 and 1938, AND THE REPORTS FOR THE YEAR 1939 UP TO NOVEMBER 9, 1939”, shall be amended to read:

“\* \* \* and certified copies of the bound reports of Charles A. Firth, the Court’s Water Commissioner, for the years 1936, 1937 and 1938, and the extracts of reports of C. A. Firth, Water Commissioner for the District of Arizona, for the months of January to October, 1939, inclusive, as per defendants’ Designation of Parts of Record, item number 20, page 14, and stipulation therein mentioned, filed April 9, 1940, as amended May 18, 1940, by deleting lines 7 to 16, inclusive, on page 2, thereof, and substituting a new page 2 [737] with said deletion in lieu thereof.”

It is further stipulated that this stipulation be included in said record on appeal.

Dated Phoenix, Arizona, May 18, 1940.

H. VEARLE PAYNE,

By ATH

L. F. McHALFFEY,

By ATH.

Of Counsel:

M. C. MECHEM,

By ATH.

A. T. HANNETT.

Attorneys for Respondents.

F. E. FLYNN,  
By HSM,  
United States Attorney.  
H. S. McCLUSKEY,  
Special Attorney.  
JOHN C. GUNG'L,  
By HSM,  
Attorneys for Petitioners.

[Endorsed]: Filed May 22, 1940. [738]

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#### GOVERNMENT'S EXHIBIT A

State of New Mexico,  
Office of State Engineer.

I, Thomas M. McClure, duly appointed and qualified State Engineer of the State of New Mexico, do hereby certify that the attached is a true and correct copy of Application for Permit to Change the Place Or Method of Use, on file in this office under Declaration No. 096.

In witness whereof, I hereunto set my hand and official seal this 10th day of October, 1939.

[Seal] THOMAS M. McCLURE. [739]

#### APPLICATION FOR PERMIT TO CHANGE THE PLACE OR METHOD OF USE

Filed: Jun. 27, 1938. Office State Engineer, Santa Fe, N. M.

Before the State Engineer,  
Santa Fe, New Mexico.

Re: Application #096 Filed in the Office of the State Engineer, Santa Fe, New Mexico.

The undersigned Ezra Curtis, Mrs. E. G. Davidson, widow, Mrs. J. R. Beavers, widow, Mrs. Flor-

ence R. Swafford, widow, W. F. Foster and Lula Foster, his wife, and R. H. Lunt and Pearl Lunt, his wife, vendors and transferors, and M. L. Richins, Floyd A. Brown, Hans Mortensen, R. T. Johns and Robert Mortensen, Mrs. Florence R. Swafford and W. F. Foster, vendees and transferees concurred in by the Sunset Ditch Company (The Cosper-Windham Ditch Company) and the Moddle Canal Company, all of Virden, Hidalgo County, New Mexico hereby make application to change the place of use of water, from the lands separately described herein, to the lands separately described herein, all under the Sunset Canal, (The Cosper-Windham Canal) and the Moddle Canal, of the Gila River, for the reasons as set forth in the statement and exhibits accompanying this application, the right to the use of the water having been acquired by beneficial use and recognized by that certain Decree entered in the District Court of the United States in and for the District of Arizona entitled United States of America, plaintiff, versus D. E. Adams, et al, defendants (In Equity #E-59 Globe):

Florence R. Swafford

Florence R. Swafford has purchased water right held under Court Decree by Ezra Curtis, purchaser from G. V. Lunt, covering eleven acres of land described as follows:

An irregular shaped tract as shown by the Atkinson Survey located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
W $\frac{1}{2}$ and S $\frac{1}{2}$ of NW $\frac{1}{4}$ SE $\frac{1}{4}$ (Priority of 1917)	33	18S.	21W.	2.8
S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ , NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ ,				
SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$	33	18S.	21W	8.2
To be abandoned by Curtis.....				11.0

[740]

### Land to Which Water Right Is to Be Transferred

This being an irregular shaped tract as shown by the Atkinson Survey and located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
S $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{2}$ of Lot 2.....	5	19S	21W	1.3
The North $\frac{3}{4}$ s of the SE $\frac{1}{4}$ of Lot 2.....	5	19S	21W	7.5
E $\frac{1}{2}$ E $\frac{1}{2}$ SW $\frac{1}{4}$ of Lot 2.....	5	19S	21W	2.2
				11.0

Florence R. Swafford holds by the said Court Decree the water right for 1.5 acres of land described as follows:

An irregular shaped tract as shown by the Atkinson Survey located in:

Subdivision	Sec.	Twp.	Rng.	Acres.
SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ (Priority of 1885).....	32	18S	21W	1.5

Said land to be abandoned and water right transferred to an irregular shaped tract as shown by the Atkinson Survey, belonging to Florence R. Swafford, located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
N $\frac{1}{2}$ N $\frac{1}{2}$ , of Lot 2.....	5	19S	21W	1.14
SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$	32	18S	21W	.36
				1.50

M. L. Richins

M. L. Richins has purchased water right held under the said Court Decree by Ezra Curtis, (pur-

chaser from G. V. Lunt) covering five acres of land described as follows:

An irregular shaped tract of land as shown by the Atkinson Survey located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ , (Priority of 1917).....	33	18S	21W	5.0
To be abandoned by Curtis.....				5.0

M. L. Richins has purchased water rights held under the said Court Decree by Mrs. E. G. Davidson covering three acres of land described as follows:

An irregular shaped tract as shown by the Atkinson Survey located in the following subdivisions.

[741]

Subdivision (Priority of 1886)	Sec.	Twp.	Rng.	Acres.
N $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{4}$ , Lot 3 (bounded on the S by fence) 4 19S 21W 1.5				
E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ Lot 3 (bounded on S and W by fence) .....	4	19S	21W	1.5
To be abandoned by Davidson.....				3.0

#### Land to Which Water Right Is to Be Transferred

This being an irregular tract as shown by the Atkinson Survey, belonging to M. L. Richins, and located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
N $\frac{1}{2}$ of Lot 4.....	4	19S	21W	5.0
N $\frac{1}{2}$ N $\frac{1}{2}$ N $\frac{1}{2}$ , of Lot 4.....	4	19S	21W	3.0
Total transferred to Richins.....				8.0

### Hans Mortensen

Hans Mortensen has purchased water right held under the said Court Decree by Mrs. E. G. Davidson covering five acres of land described as follows:

Subdivision	Sec.	Twp.	Rng.	Acres.
N $\frac{1}{2}$ NE $\frac{1}{4}$ of Lot 3 (Priority of 1886).....	4	19S	21W	5.0
To be abandoned by Davidson.....				5.0

### Land to Which Water Right Is to Be Transferred

This being an irregular shaped tract as shown by the Atkinson Survey, belonging to Hans Mortensen, located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
W $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ , .....	11	19S	21W	5.0

### Floyd A. Brown

Floyd A. Brown has purchased water right held under the said Court Decree by R. H. Lunt, covering three acres of land described as follows:

An irregular shaped tract as shown by the Atkinson Survey located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ , (Priority of 1917).....	33	18S	21W	3.0
To be abandoned by Lunt.....				3.0

[742]

### Land to Which Water Right Is to Be Transferred

This being an irregular shaped tract as shown by the Atkinson Survey, belonging to Floyd A. Brown and located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ .....	3	19S	21W	3.0

Robert Mortensen and Emma Mortensen, Wife of Arvin Mortensen, Deceased, Keith, Mancel, Marcel, Hal, Doris and Flora Mortensen, Children and Heirs at Law of Arvin Mortensen, Deceased.

Robert Mortensen, and Emma Mortensen, wife of Arvin Mortensen, deceased, Keith, Mancel, Marcel, Hal, Doris, and Flora Mortensen, children and heirs of Arvin Mortensen, deceased, have purchased water right held under the said Court Decree by J. R. Beavers, covering 23.5 acres of land described as follows:

An irregular shaped tract as shown by the Atkinson Survey located in the following subdivisions:

Subdivision		Sec.	Twp.	Rng.	Acres.
NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$	(Priority 1885)	4	19S	21W	1.7
S $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ Lot 2, SE $\frac{1}{4}$ SE $\frac{1}{4}$ Lot 2	" "	4	19S	21W	3.0
NE $\frac{1}{4}$ Lot 2	" "	4	19S	21W	9.0
NW $\frac{1}{4}$ Lot 2 (less 1.1 acres in the SW corner thereof)	" "	4	19S	21W	8.2
N $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ Lot 2.....		4	19S	21W	1.6
To be abandoned by Beavers.....					23.5

#### Land to Which Water Right Is to Be Transferred

This being an irregular shaped tract as shown by the Atkinson Survey, belonging to Robert Mortensen and the above named heirs, and located in the following subdivisions:

Subdivision		Sec.	Twp.	Rng.	Acres.
S $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{4}$ .....		18	19S	20W	20.5
N $\frac{1}{2}$ SE $\frac{1}{4}$ , E $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ , of Lot 2.....		3	19S	21W	3.0
Total transferred to Mortensen.....					23.5

## R. T. Johns

R. T. Johns has purchased water right held under the said Court Decree by Mrs. J. R. Beavers covering 12.5 acres of land described as follows: [743]

An irregular shaped tract as shown by the Atkinson Survey located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ (Priority of 1885).....	4	19S	21W	1.00
W $\frac{1}{2}$ Lot 1 (Priority of 1898).....	4	19S	21W	11.5
To be abandoned by Beavers.....				12.5

## Land to Which Water Right Is to Be Transferred

This being an irregular shaped tract as shown by the Atkinson Survey, belonging to R. T. Johns, and located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
S $\frac{1}{2}$ S $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ , .....	18	19S	20W	3.7
NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ , .....	18	19S	20W	5.1
E $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ .....	18	19S	20W	3.7
Total transferred to Johns.....				12.5

## W. F. Foster

W. F. Foster holds by Court Decree a water right for 22.4 acres of land described as follows:

An irregular shaped tract as shown by the Atkinson Survey located in the following subdivisions:

## List No. 1

Subdivision	Sec.	Twp.	Rng.	Acres.
S $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	2.5
S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	1.3
W $\frac{1}{2}$ W $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	0.3
W $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	5.0
N $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	5.0
SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	2.2
SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	2.4
				—
NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ , (lying north of Shriver Ditch) 10	10	19S	21W	3.7
				18.7
				22.4

## Land to be Retained Under List No. 1

S $\frac{1}{2}$ & W $\frac{1}{2}$ of NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ .....	3	19S	21W	1.6
SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	2.5
N $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	5.0
SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	2.2
N $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	0.7
				—
				12.0

## Land to be Abandoned Under List No. 1

S $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	2.5
S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	1.3
[744]				

Subdivision	Sec.	Twp.	Rng.	Acres.
W $\frac{1}{2}$ W $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	0.3
N $\frac{1}{2}$ & E $\frac{1}{2}$ of NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	1.2
S $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	1.4
NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ (lying North of Shriver Ditch) 10	10	19S	21W	3.7
				—
				10.4

## Land to Which Water Right is to be Transferred

N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	5.0
N $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	1.4
NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	2.5
N $\frac{1}{2}$ & E $\frac{1}{2}$ of NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	0.9
N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ , .....	3	19S	21W	0.6
				—
				10.4

The above named vendors and transferors Mrs. Florence Swafford, widow, Ezra Curtis, Mrs. E. G. Davidson, widow, R. H. Lunt, and Pearl Lunt, his wife, Mrs. J. R. Beavers, widow, W. F. Foster, and Lula Foster, his wife for and in consideration of One Dollar and other valuable considerations have granted, bargained, sold, remised, conveyed, released and confirmed and by these presents do grant, bargain, sell, remise, convey, release and confirm unto their respective vendees and transferees as herein above mentioned all of their right title and interest in and to the water rights appurtenant to those tracts or parcels of land herein above described as belonging to them to have and to hold the said water rights unto the above mentioned vendees and transferees and as appurtenant to the lands above described as belonging to said vendees.

That said sale is made by and with the full and free knowledge and consent of the above named vendors and by and with the consent of the Sunset Canal Company, (The Cosper-Windham Canal Company), and the Moddle Canal Company.

That the vendees herein agree that the said water rights are to become appurtenant to their lands as herein above described by reason of the purchase of the same as herein set forth and they respectively request that the said transfer be approved and confirmed by the State Engineer, Santa Fe, New Mexico, and that the said engineer take such steps as necessary to complete the transfer as is required by law. [745]

In witness whereof the parties hereto have set their hands and seals this 16th day of April, A. D., 1938, and the Sunset Canal Company, (Cosper-Windham Canal Company), and the Moddle Canal Company have hereunto set their names by their presidents the said 16th day of April, A. D., 1938.

SUNSET CANAL COMPANY,  
(Cosper-Windham Canal Company)

By (Signed) PARLEY P. JONES,  
President.

MODDLE CANAL COMPANY,

By (Signed) JOSEPH D. WILKINS,  
President.

(Signed) EZRA CURTIS,

---

Mrs. ..... Curtis,

(Signed) MRS. E. G. DAVIDSON,

(Signed) W. F. FOSTER,

(Signed) LULA FOSTER,

---

Mrs. ..... Foster,

(Signed) MRS. PEARL LUNT,X

(Signed) MRS. FLORENCE R. SWAFFORD

(Signed) FLOYD A. BROWN,

(Signed) R. T. JOHNS,

(Signed) MRS. J. R. BEAVERS,

---

W. F. Foster,

(Signed) RANDALL H. LUNT,X  
R. H. Lunt,

(Signed) M. L. RICHINS,

(Signed) HANS MORTENSEN,

(Signed) ROBERT MORTENSEN.

State of New Mexico,  
County of Hidalgo—ss.

On this 16th day of April, A. D., 1938, before me personally appeared Parley P. Jones, President of the Sunset Canal Company, (Cosper-Windham Canal Company), and Joseph D. Wilkins, President of the Moddle Canal Company, and Ezra Curtis, Mrs. E. G. Davidson, widow, Mrs. J. R. Beavers, widow, W. F. Foster, Lula Foster, his wife, R. H. Lunt, Pearl Lunt, his wife, Mrs. Florence R. Swafford, widow, M. L. Richins, Floyd A. Brown, Hans Mortensen, R. T. Johns and Robert Mortensen, to me known to be [746] the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] (Signed) H. VEARLE PAYNE,  
Notary Public.

My commission expires August 28, 1941. [747]

State of New Mexico,  
County of Hidalgo—ss.

On this 16th day of April, 1938, before me appeared Joseph D. Wilkins, to me personally known, who, being by me duly sworn did say that he is the President of the Moddle Canal Company and that the seal affixed to said instrument is the corporate seal of said corporation and that the said instru-

ment was signed and sealed in behalf of said corporation by authority of its Board of Directors and said Joseph D. Wilkins acknowledged said instrument to be the free act and deed of said corporation.

[Seal] (Signed) H. VEARLE PAYNE,  
Notary Public.

My commission expires August 28, 1941. [748]

State of New Mexico,  
County of Hidalgo—ss.

Comes now Parley P. Jones, President of the Sunset Canal Company, (Cosper-Windham Canal Company), and Joseph D. Wilkins, President of the Moddle Canal Company, and Ezra Curtis, Mrs. E. G. Davidson, widow, Mrs. Jr. R. Beavers, widow, W. F. Foster, Lula Foster, his wife, R. H. Lunt, Pearl Lunt, his wife, Mrs. Florence R. Swafford, widow, M. L. Richins, Floyd A. Brown, Hans Mortensen, R. T. Johns and Robert Mortensen, who being first duly sworn each for himself and not one for the other deposes and says that he or she has read the foregoing application for permit to change the place of use of water rights; that at the time of the ensealing and execution of these instruments he or she is the owner of the tract or parcels of land designated as belonging to him or her in the foregoing application and that he or she has full power and lawful authority to grant, bargain, and sell the same in the manner aforesaid; That the above sale and transfer is made with his or her consent and

that the statements and representations made in the said application are true to the best of their knowledge and belief; Further affiant sayeth not.

(Signed) MRS. FLORENCER SWAFFORD,  
(Signed) MRS. E. G. DAVIDSON,  
(Signed) FLOYD A. BROWN,  
(Signed) MRS. J. R. BEAVERS,  
(Signed) M. L. RICHINS,  
(Signed) W. F. FOSTER,  
(Signed) LULA FOSTER,  
(Signed) EZRA CURTIS,  
(Signed) HANS MORTENSEN,  
(Signed) ROBERT MORTENSEN,  
(Signed) R. T. JOHNS,  
(Signed) MRS. PEARL LUNT,X  
(Signed) RANDALL H. LUNT,X  
(Signed) PARLEY P. JONES,  
(Signed) JOSEPH D. WILKINS.

Subscribed and sworn before me this 16th day of April, A. D., 1938.

[Seal] (Signed) H. VEARLE PAYNE,  
Notary Public.

My commission expires August 28, 1941. [749]

[Endorsed]: Govts. Exhibit No. A admitted and filed Nov. 9, 1939. [750]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
RECORD AND DOCKETING APPEAL

This cause coming on to be heard upon motion of respondents-appellants for an extension of time within which the record of appeal to the United States Circuit Court of Appeals of the Ninth Circuit may be filed and docketed in said court and the court being fully advised in the premises:

It is by the court ordered that the time for filing said record of appeal and docketing said action in the said United States Circuit Court be and hereby is extended until the 15th day of June, 1940.

ALBERT M. SAMES,  
United States District Judge.

[Endorsed]: Filed Apr. 10, 1940. [751]

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[Title of District Court.]

United States of America,  
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, versus Gila Valley Irrigation District, et al, Defendants, numbered E-59—Globe, on the docket of said Court.

I further certify that the foregoing pages numbered 1 to 751, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all papers filed therein, together with the endorsements of filing thereon, called for in appellants' designation of the portions of the record, proceedings and evidence to be contained in the record on appeal from the judgment of contempt and fine thereon entered March 11, 1940, in the above-entitled cause, and in the stipulations designating the contents of said record filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$325.45, and that said sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court this 8th day of June, 1940.

[Seal]

EDWARD W. SCRUGGS,

Clerk.

[Endorsed]: No. 9544. United States Circuit Court of Appeals for the Ninth Circuit. R. W. Brooks, Carl M. Donaldson, Byron Echols, B. J. Gale, G. Lynn Hatch, Rachel Jensen, Milton N. Jensen, R. T. Johns, Willard E. Jones, John B. Jones, Parley P. Jones, T. V. Jones, P. L. Lunt, Fenley F. Merrill, Orson A. Merrill, Hans Mortensen, Leslie B. Payne, Orson J. Richens, Henry L. Smith, Florence R. Swofford, Mary Jane Jones, Anna H. Lunt, Nancy O. Pace, Junius E. Payne, J. E. Payne, Trustee of the Church of Jesus Christ of Latter Day Saints, E. C. Payne, Ralph Richardson, R. Richens, Nancy A. Smith, E. Thygerson, and B. Y. Whipple, Appellants, vs. United States of America, and C. A. Firth, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed: June 10, 1940.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 9544

R. W. BROOKS, et al,

Appellants,

vs.

UNITED STATES OF AMERICA, and  
C. A. FIRTH,

Appellees.

STATEMENT OF POINTS TO BE RELIED  
UPON BY APPELLANTS, TOGETHER  
WITH DESIGNATION OF PARTS OF  
RECORD TO BE PRINTED

Pursuant to sub-division 6 of Rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, appellants make the following statement of points upon which they intend to rely upon this appeal, together with designation of the parts of the record to be printed.

## Points

Appellants adopt all of the Statement of Points appearing in the transcript of record as certified by the Clerk of the United States District Court for Arizona now on file in this cause, being Points I to XXXI inclusive.

## Designation of Record to Be Printed

Appellants designate to be printed the entire transcript of record as certified to by the Clerk of

the United States District Court for the District of Arizona now on file in this cause.

As per stipulation, the decree entered June 29, 1935, in the United States District Court for the District of Arizona, and annual reports of C. A. Firth for the years 1936, 1937, and 1938, are not to be printed.

A. T. HANNETT,

M. C. MECHEM,

Attorneys for Appellants.

[Endorsed]: Filed June 15, 1940. Paul P. O'Brien, Clerk.

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[Title of Circuit Court of Appeals and Cause.]

### STIPULATION

It is hereby and herein stipulated by and between counsel for appellants and appellees, that in making up the designation of parts of contents of record on appeal and record on appeal the Clerk of the United States District Court for the District of Arizona shall certify a copy of the decree entered June 29, 1935, including the stipulation for consent to the entry of final decree, as printed by the United States Government Printing Office in 1935 (as shown on the last page thereof), along with the record; and certified copies of the bound reports of Charles A. Firth, the Court's Water Commissioner, for the years 1936, 1937 and 1938, and the extracts

of reports of C. A. Firth, Water Commissioner for the District of Arizona, for the months of January to October, 1939, inclusive, as per defendants' Designation of Parts of Records, item number 20, page 14;

It is further stipulated that the appellees herein shall furnish to the Clerk of this Court copies of said instruments to be certified by the said Clerk of the United States District Court for the District of Arizona, and that the appellees herein shall furnish to this court four (4) copies each of said instruments in addition to the certified copies;

It is further stipulated that the said instruments shall not be printed as part of the record in this cause but that said instruments may be considered by this court as a part of the record in this cause for the purpose of appeal, and all the parts thereof which shall be referred to in the briefs shall be printed in an appendix to the briefs.

M. C. MECHEM,

P. O. Box 497,

Albuquerque, New Mexico.

A. T. HANNETT,

P. O. Box 497,

Albuquerque, New Mexico.

Attorneys for Appellants.

FRANK E. FLYNN,  
United States Attorney,  
204 U. S. Court House,  
Phoenix, Arizona.

H. S. McCLUSKEY,  
Special Attorney,  
Ellis Building,  
Phoenix, Arizona,  
Attorneys for Appellees.

JOHN C. GUNG'L  
By H. S. Mc

Consolidated National Bank  
Bldg., Tucson, Arizona,  
Attorney for C. A. Firth.

So Ordered.

FRANCIS A. GARRECHT,  
United States Circuit Judge.

[Endorsed]: Filed June 28, 1940. Paul P.  
O'Brien, Clerk.

